



A P P E A R A N C E S:

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1 THE CLERK: Agostino vs. Quest Diagnostics, 04-4362.  
2 Please note your appearances for the record.

3 MR. TUSA: Joseph Tusa from the firm of Whalen & Tusa  
4 for the plaintiffs, your Honor. Good morning.

5 MS. RODRIGUEZ: Good morning, your Honor. Lisa  
6 Rodriguez also for the plaintiffs.

7 THE COURT: Good morning.

8 MR. MELODIA: Good morning, your Honor. Mark  
9 Melodia from Reed Smith for the defendant Quest.

10 MS. BETTINO: Good morning, your Honor. Diane  
11 Bettino, also from Reed Smith and also on behalf of Quest  
12 Diagnostics.

13 MR. CIPPARULO: Good morning, your Honor. Peter  
14 Cipparulo from the law firm Garrity, Graham, Murphy,  
15 Garofalo & Flinn on behalf of the defendants American  
16 Medical Collection Agency, Russell Collection Agency,  
17 Credit Bureau Central, Quantum Collection, Seattle Service  
18 Bureau, Incorporated.

19 THE COURT: And Mr. Cipparulo, they've disowned you  
20 over there. They've made you --

21 MR. CIPPARULO: I just like to be as far away from  
22 the fray as possible, your Honor.

23 THE COURT: All right.

24 MR. CIPPARULO: Thank you.

25 THE COURT: Okay. Who's going to be arguing for

1 plaintiffs?

2 MR. TUSA: I will, your Honor.

3 THE COURT: All right, Mr. Tusa. It's your motion.  
4 I'll hear you.

5 MR. TUSA: Thank you very much. Does your Honor  
6 prefer we use the podium?

7 THE COURT: Wherever you are comfortable.

8 MR. TUSA: If it's okay with your Honor, I'll stay at  
9 counsel table. I'm fighting a little bit of a cold. If  
10 you need me to speak up, please let me know.

11 With your Honor's indulgence and permission, I may be  
12 referring to some hearing exhibits we brought with us. I  
13 prepared a packet of them. May I hand it up? I have  
14 plenty.

15 THE COURT: Sure. Make sure opposing counsel has  
16 copies. Thanks.

17 MR. TUSA: These are the same charts.

18 THE COURT: Okay. Thank you, Mr. Tusa.

19 MR. TUSA: Thank you, your Honor. As your Honor is  
20 aware, this is plaintiffs' renewed motion for class  
21 certification. We had made a motion about three years ago.

22 About a little more than a year ago, February 2008, I  
23 believe, your Honor decided it, denying class  
24 certification.

25 From plaintiffs' perspective, I think the first thing

1 I could say is, you know, we took your Honor's opinion very  
2 seriously. We abided by it very closely. My colleagues  
3 and I spent a good amount of time deciding whether or not  
4 we should seek 23(f) appeal.

5 Your Honor wrote an extraordinarily in-depth opinion  
6 and after reading it, we decided it was, in fact, a road  
7 map of how we could perhaps renew our motion.

8 I think what came through in your Honor's first  
9 opinion, came through crystal clear, you thought we bit  
10 off too much. You thought we tried to go after too much,  
11 too many legal claims, too many practices. I think that  
12 came through crystal clear to plaintiffs and I sort of want  
13 to start out where defendants' opposition starts out, with  
14 this notion that somewhat gets mixed up that either we  
15 weren't allowed to make a renewed motion for class  
16 certification or that, if we were, it's nothing more than a  
17 retread of our --

18 THE COURT: We'll stop that. All right. There's no  
19 doubt that you're allowed to make a renewed motion. All  
20 right. And indeed, look, my comments when we had our  
21 informal conference were really directed at two issues; one  
22 which was, yeah, you took a good long time to look over  
23 what you wanted to do with this complaint, about a year.

24 And secondly, as I commented, the fact that Judge  
25 Dickinson Debevoise and I came out with different analysis

1 on choice-of-law issues is not a basis for a  
2 reconsideration motion.

3 And I will tell you today that that is a view which I  
4 continue to adhere to. To the extent that there is, you  
5 know, a difference of opinion between Judge Debevoise and  
6 this Court, if it ultimately has to be resolved, it will be  
7 resolved by the Third Circuit Court of Appeals.

8 But, quite frankly, you indeed have a different class  
9 that you are defining at this point and that raises  
10 different issues to some degree. So, let's get both of  
11 those out of the way. All right?

12 MR. TUSA: Fine. Good. That, I mean that clears the  
13 slate and brings us exactly to where we want to start.

14 Leaving aside, and we agree a hundred percent about  
15 the right to make a new motion, our first hearing exhibit,  
16 your Honor, and I'm not going to belabor the point at this  
17 point in time, goes through the differences between the  
18 first motion and the second motion because -- a number of  
19 reasons.

20 You know what, those differences are what are at  
21 issue today and in this present motion, I think one of our  
22 pointed critiques of the defendants' oppositions is they  
23 somewhat relive the past.

24 A good amount of their opposition brief, for  
25 instance, likes to talk about individual issues that they

1 believe still need to be addressed, citing very liberally  
2 your Honor's first opinion talking about, for instance --

3 THE COURT: You're all very good at citing those  
4 portions of my opinion which favor you.

5 MR. TUSA: I'm sure we do. I'm sure we do, your  
6 Honor. That all being said, your Honor has another  
7 comprehensive set of briefs in front of you. We were not  
8 intending today to go through all of those points. You  
9 have our briefs.

10 I want to just pick up on just a few of the items,  
11 perhaps raise a few issues that have come to light in the  
12 court decisions since we've briefed it and, of course, and  
13 most directly address any questions your Honor has.

14 So, like I say, the exhibit chart number one is  
15 really the differences between the first and the second  
16 motion, and some of them are quite pointed.

17 For instance, in the first motion, your Honor, we  
18 were seeking both a (b)(2) and (b)(3) classes. We no  
19 longer seek (b)(2) classes. We no longer seek injunctive  
20 remedies. We no longer seek equitable remedies.

21 THE COURT: In other words, you decided you're not  
22 going to try for belt and suspenders.

23 MR. TUSA: We are not going to try for belt and  
24 suspenders. Again, I say, your Honor, we read your opinion  
25 very closely and while I won't stand up here and say my

1 colleagues and I agreed with it all, we read it and, for  
2 instance, we limit all of our classes to only those people  
3 who have ascertainable out-of-pocket losses.

4 No longer do we say somebody is going, you know, just  
5 because they were billed in an inappropriate way, should  
6 they be in the class.

7 The one exception to that is for the debt collector  
8 class, the FDCPA does recognize a statutory violation, and  
9 that's a small part.

10 Last time, the first chart I showed your Honor were  
11 nine Quest pre-EOB billing practices. Save for billing of  
12 Medicare patients, we don't rely on any pre-EOB billing  
13 practices anymore.

14 We pick up from where defendants and their experts  
15 and their counsel last time said one needs to pick up, from  
16 the issuance by the insurance company of an EOB or an EOB  
17 that's electronic is called an ERA, electronic remittance.

18 For today's hearing, your Honor, I will just use the  
19 term EOB but I will be referring to the electronic version  
20 and the regular version.

21 We no longer seek any class for ERISA. We no longer  
22 seek any class for common law fraud. We only have one  
23 class that seeks breach of contract under one state law.  
24 That is our Anthem Blue Cross Blue Shield class. It relies  
25 on one provider agreement, that provider agreement being



1 Quest, Anthem Blue Cross Blue Shield, and one sub-plan,  
2 because your Honor was pretty clear last time that there  
3 are a lot of provider agreements, there could be sub-plans  
4 within provider agreements and that could cause additional  
5 manageability and predominance issues, so, we have limited  
6 that class now, Anthem Blue Cross class. One provider  
7 agreement, one sub. That sub-plan being the Federal  
8 Employees Health Benefits program.

9 And why that one? Because our class rep, Mr.  
10 Grandalski, was a member of that plan and that sub-plan.  
11 He was a 37-year employee of the Department of Agriculture,  
12 retired now, retired as the director of civil -- I think  
13 assistant director of some civil compliance, now in  
14 retirement works for the United States and the World Bank.  
15 That's why that's the plan. That's why that's the  
16 sub-plan.

17 Our choice-of-law analysis, you touched on it before.  
18 I am not going to stand up here and try to change your  
19 Honor's mind on the choice-of-law standards. You have our  
20 briefs.

21 The one additional thing I would add to our briefs is  
22 the Third Circuit's opinion in Cooper v. Samsung. We think  
23 it adds quite a bit.

24 THE COURT: I'm just curious how -- first -- actually  
25 two things. First of all, and I will candidly caution both

1 of you, when the Third Circuit issues a non-precedential  
2 opinion, the Court, of course, is going to examine it for  
3 its persuasive authority, but that's what it is.

4 The Third Circuit has repeatedly cautioned district  
5 courts they are not to treat non-precedential opinions as  
6 if they were precedential opinions.

7 Indeed, if I take a look at that opinion, if I recall  
8 correctly, two of the three judges who authored that  
9 opinion are on senior status, and the third judge dissented  
10 and actually, as far as I can see, it is a dissent which  
11 most strongly favors your position because the dissent, in  
12 fact, seems to take the position that Judge Debevoise, in  
13 Mercedes-Benz, got it right and that the issues which Judge  
14 Debevoise focused on in Mercedes-Benz, if we were going to  
15 use subdivision two --

16 MR. TUSA: Right.

17 THE COURT: -- would have warranted at least a very  
18 careful consideration of New Jersey law as being the choice  
19 of law.

20 The other two judges using subdivision two said  
21 taking a look at all these factors, we still end up with --  
22 I forget which Midwestern state it was --

23 MR. TUSA: Arizona.

24 THE COURT: -- Midwestern state substantive law  
25 applies, New Jersey's Consumer Fraud Act does not get extra

1 territorial effect and will not be able to export its  
2 civilizing aspects to benighted sections of the country.

3 MR. TUSA: Your Honor's recall is a hundred percent  
4 correct and, again, it wasn't my intention to belabor that  
5 aspect of our choice-of-law opinion today.

6 THE COURT: Okay.

7 MR. TUSA: I know it's an area of interest to your  
8 Honor and your Honor was correct in the opinion.

9 We cite, of course Cooper is an NPO opinion, as is  
10 Nafar, which the Third Circuit also slightly dipped its toe  
11 into these issues as well.

12 THE COURT: And in fact, if you folks have been  
13 paying very careful attention, the Third Circuit vacated  
14 the decision in DeBeers.

15 MR. TUSA: Yeah.

16 THE COURT: And is going to hear it en banc, and that  
17 could create one of the more interesting issues about  
18 choice-of-law analysis, although of course, as you're all  
19 fully aware, that the choice-of-law issue, coupled with  
20 what is -- well, not coupled with an issue which is present  
21 here, which is manageability.

22 MR. TUSA: We, of course, read your Honor's opinion in  
23 Sullivan. We read the Third Circuit's pre-vacation opinion  
24 in Sullivan and the order vacating it, and your Honor is  
25 right, the Third Circuit is going to continue along with

1 its instructive analysis in the area of certification of  
2 multi-state classes.

3 You know, obviously they're at the vanguard of this  
4 issue back when they decided the Prudential sales  
5 litigation in '98. They added something to it in the  
6 Warfarin analysis I believe in 2004. Again, those were  
7 both settlement opinions, in where both instances the court  
8 said, sure, you can group the multi-state.

9 Now, those were settlement classes, so, admittedly  
10 they didn't have the touch on manageability and  
11 superiority, but the Warfarin court, and I believe -- yeah,  
12 the Warfarin court, and I'm trying to remember the decision  
13 afterwards, were careful to say just because you have  
14 multiple states and you see certification in multiple  
15 states, you are not going to run afoul necessarily of  
16 predominance and commonality.

17 Of course, and plaintiffs acknowledge this, there is  
18 a burden to be shouldered if you are the plaintiffs and you  
19 seek a multi-state class certification, as we do for at  
20 least one of our legal claims. The burden is on us to show  
21 you that it is manageable in a non-settlement context and  
22 to the extent predominance and commonality and typicality  
23 come into play, certainly those as well.

24 If it's okay with your Honor, I'm going to put choice  
25 of law aside for the moment.

1           THE COURT:   Okay.   Except let me ask you one other  
2   question.

3           MR. TUSA:    Sure.

4           THE COURT:   You cite a couple of cases which  
5   essentially assert -- all right -- and on the choice of law  
6   issue, of course, the key is the Consumer Fraud Act and  
7   whether or not it can be applied to a nationwide class.

8           Your alternate B is groupings of consumer fraud type  
9   statutes, and I've read your briefing on that, on both  
10   sides.

11          Alternate C, I will tell you, I've read those  
12   opinions.   Exemplars, what are exemplars?   Are these test  
13   cases they're talking about?

14          MR. TUSA:    You're making reference to the Relafen  
15   opinion and the Carzem opinion?

16          THE COURT:   Yes.

17          MR. TUSA:    The federal judges in Relafen, District of  
18   Massachusetts, which was Chief Judge Young, and I'm trying  
19   to recall the judge's name in Carzem way back when it was a  
20   case -- I'm sorry, escapes me at the moment -- faced with a  
21   multiple state certification, these were primarily cases  
22   that challenged pharmaceutical drug pricing.

23          THE COURT:   And they're antitrust cases, and they're  
24   antitrust cases and they -- the problem was national class,  
25   was a federal antitrust case and the problem with state

1 class, state antitrust certification was Illinois Brick and  
2 Illinois Brick Repealers. Gee, sounds like DeBeers.

3 MR. TUSA: Sounds a lot like DeBeers. As your Honor  
4 is most acutely aware from your DeBeers experience and  
5 perhaps others, the Illinois Brick Repealer states have  
6 been entered not nationwide. It's a decision certain state  
7 legislators have made and, more to the point, some state  
8 legislators, some state courts recognizes Illinois Brick  
9 Repealers, some in the antitrust statute, some in the  
10 consumer protection statute.

11 THE COURT: I'm trying to understand what this Court  
12 did. They certified a national class on federal antitrust  
13 claims and did not certify a national class on state  
14 antitrust claims.

15 MR. TUSA: Your Honor asked whether there was --

16 THE COURT: And what did they do?

17 MR. TUSA: Well, your Honor asked if they certified a  
18 test case. It seems to me that they did certify a test  
19 case. They wanted to take the case through the pretrial  
20 phase using the test case. They're going to try it, that  
21 case, and assuming it worked out for the plaintiffs, then  
22 the court apparently was going to deal with the remainder  
23 of the certifications.

24 I could tell you in both cases it never got to that  
25 because the cases settled.

1           THE COURT:   Okay.   But let me ask you this.   If I  
2   were in theory to do that -- well, let me take it back.  
3   Step back.

4           MR. TUSA:    Sure.

5           THE COURT:   Let's take those test cases.   Suppose  
6   they certify a national class, a federal antitrust Sherman  
7   violation act, if I recall correctly.

8           MR. TUSA:    Sure.

9           THE COURT:   All right.   And they certify six exemplar  
10   states and they try state antitrust claims against  
11   remote -- involving remote purchases in those exemplar  
12   cases.   Now, the view is then towards coming to a  
13   settlement.   Correct?

14          MR. TUSA:    I can't necessarily put myself in Chief  
15   Judge Young's head.   I imagine it certainly was a factor in  
16   it, although I don't know why exactly he did --

17          THE COURT:   Well, exemplar cases are typically used  
18   in cases which have been consolidated by the panel on  
19   Multi-District Litigation to, in fact, see whether or not  
20   there is a pattern that can be used to do overall mass  
21   settlements.   Correct?

22          MR. TUSA:    And both of those were JP MDL cases.

23          THE COURT:   Okay.   Now, my question is suppose you  
24   did some exemplar cases in those antitrust cases.

25          MR. TUSA:    Sure.

1           THE COURT: And suppose the remote purchases did well  
2 and got recoveries in those test cases.

3           If the panel decision in DeBeers were to stand, there  
4 would still be no possible settlement, would there, because  
5 at its core, the panel decision in DeBeers says you can't  
6 do a class certification for a class where members of your  
7 class have no cause of action whatsoever.

8           MR. TUSA: That is what's -- that is some of what  
9 Sullivan says, your Honor. Yes, your Honor.

10          THE COURT: Look, if I put Judge Jordan's holding in  
11 plain English -- all right -- that's what it says. It says  
12 I tried to put apples and oranges together in this  
13 settlement.

14          MR. TUSA: Well, I'd answer a couple fold, your  
15 Honor. I don't disagree with your Honor's reading of it.  
16 In reading the panel decision in Sullivan, I think my  
17 colleagues and I -- I speak for myself if nothing else --  
18 thought it was a little odd that the body of the decision  
19 said that and in the footnotes would commonly say but we're  
20 not saying this could never happen just on these facts.

21          Now, I don't -- let me say something. I don't  
22 disagree with -- I don't disagree with both Judge Jordan's,  
23 and to the extent your Honor agrees with Judge Jordan's  
24 comment, that you can't allege a class from a state statute  
25 where there is no claim. And for instance, let me just



1 suggest, we have suggested grouping the statutes in two  
2 groups, your Honor, and we don't have all the state  
3 statutes.

4 There are nine states that we have no statutes for.  
5 Why is that? Because there either is no private right of  
6 action, ala Iowa under its separate practice statute. Some  
7 state separate practice statutes don't allow class actions;  
8 Alabama, Mississippi, South Carolina. They're not in our  
9 grouping.

10 So, I don't disagree with your Honor that you can't  
11 include in your state-by-state grouping analysis states  
12 where there's no cause of action. I don't agree with that.  
13 I think we took care in our grouping analysis for the  
14 states' separate practice statutes to only include those  
15 statutes where there is a private cause of action and class  
16 actions in particular are permitted.

17 Of course we don't draw on a blank slate. There are  
18 any number of opinions. You know that we relied somewhat  
19 heavily on Judge Saris' opinion in AWP. Seventh Circuit  
20 has recently done this in Pella, to a lesser extent.  
21 Correct.

22 We submitted to your Honor a compendium from the  
23 National Consumer Law Center, all 51 -- actually, it's more  
24 than 51 because they include some of the United States  
25 territories like the Virgin Islands and Guam, all of the

1 states' separate practice statutes we submitted, that's  
2 2009 compendium, so, we took a very close look at those  
3 consumer protection statutes, only proposed those that we  
4 thought there was a private cause of action on these facts.

5 So, I don't disagree with your Honor that -- and I  
6 don't think plaintiffs' propose state separate practice  
7 claims for a state where a claim -- this is not a  
8 settlement class, certainly not this juncture, and so, we  
9 were careful to abide by that.

10 I was going to move on but let me just stick with  
11 choice of law for just a moment to mention -- I think your  
12 Honor said, and your Honor is right, the way the new motion  
13 has broke out, choice of law really only applies to one of  
14 plaintiffs' state claims. That is the state consumer  
15 protection statutes.

16 We no longer seek any class for common law fraud.  
17 Our breach of contract is limited to one contract and one  
18 state, that's Connecticut. And your Honor has previously  
19 held, and nobody has disputed at least on this motion, that  
20 unjust enrichment law is not conflict driven and therefore  
21 we could apply New Jersey law nationwide.

22 So, the only state claims for which we proffer  
23 classes on are the state consumer protection statutes and  
24 admittedly we are at odds with defendants on the proper  
25 choice of law.

1           Your Honor has correctly also noticed we proffered  
2           three ideas, New Jersey, CFA nationwide. Your Honor has  
3           made himself clear on that.

4           I mentioned Cooper. Fair enough. I just want to  
5           mention two other cases just so it's in the record.

6           We think the Supreme Court's decision in Hertz v.  
7           Friend has some bearing on this, and there have now been at  
8           least two district court opinions, including the Federal  
9           Circuit last week, that relied on Hertz v. Friend in  
10          conducting its choice-of-law analysis.

11          THE COURT: Okay. Well, I will tell you that, and  
12          with the greatest respect for the Fed Circuit --

13          MR. TUSA: Federal Circuit, but yes, your Honor.

14          THE COURT: Yeah. With the greatest respect for the  
15          Federal Circuit, I don't buy it.

16          MR. TUSA: Okay.

17          THE COURT: I mean Hertz, you read through Hertz --  
18          look, they admit in the end that they have made a decision  
19          predicated in large part on expediency. They want a bright  
20          line test for jurisdictional purposes. They recognize that  
21          there are theoretically any number of different bases which  
22          would be used to determine the principal place of business  
23          of a corporation.

24          They chose a test which, in fact, would not have the  
25          district courts trying to figure out how many angels dance

1 on the head of a pin every time they've got a subject  
2 matter jurisdiction issue. And I mean, if you read the  
3 subtext of the opinion, that ultimately is the rationale  
4 for it, not some sort of overarching scheme about what  
5 constitutes the location of a corporation for all purposes  
6 generally.

7 MR. TUSA: Listen, your Honor's made yourself clear  
8 on this. We won't belabor --

9 THE COURT: Let me ask you, am I wrong?

10 MR. TUSA: Listen, the Supreme Court was dealing with  
11 a common problem the Supreme Court always deals with,  
12 different circuits reaching different conclusions on a, in  
13 this case, threshold matter, subject matter jurisdiction.

14 By choosing the nerve center test as they chose it,  
15 yes, part of it was expediency, but they could have just as  
16 easily for expediency purposes chose one of the alternative  
17 proffers and they thought nerve center test where the  
18 officers of the corporation made corporate level decisions,  
19 that really, you know, from their principal place of  
20 business, they thought, yes, expediency was one part of it,  
21 but that was the one that I can only imagine a unanimous  
22 Supreme Court decided made the most logistical sense.

23 Now, mind you, your Honor, it was diversity  
24 jurisdiction. We don't pretend to stand up here and say it  
25 was a choice-of-law opinion. However, it's a fairly new

1 opinion, January 2010, I believe, and already the district  
2 courts are using it in their restatement of  
3 conflict-of-laws analysis because one of the subsections,  
4 whether you use subsection one or two, has to do with where  
5 the statements are being emanating from.

6 Your Honor may not agree with that, but to the extent  
7 that your Honor is asking our opinion --

8 THE COURT: Okay.

9 MR. TUSA: -- we do believe Hertz bears on it for  
10 that way. But your Honor seems to have very definite and  
11 strong feelings on that subject and I don't want to belabor  
12 this morning's argument.

13 THE COURT: I have very definite and strong opinions  
14 that you don't take a Supreme Court decision which is  
15 designed and intended to deal with a very specific  
16 pragmatic issue which has been deviling the federal courts  
17 for decades now and say, oh, they have come up with a  
18 Rosetta Stone and apply it to all sorts of other situations  
19 where they didn't even purport to voice an opinion.

20 MR. TUSA: Fair enough, your Honor.

21 THE COURT: Okay.

22 MR. TUSA: I do. For the time being and perhaps the  
23 rest of this hearing, I'm going to move off choice of law.  
24 Maybe I'll come back if your Honor has more questions.

25 THE COURT: Okay.

1           MR. TUSA: Okay. I probably will want to circle back  
2 to some of our grouping analysis a little bit later.

3           Okay. So, our first chart today was not so much for  
4 just the point that we can make a new motion, we wanted to  
5 make it very clear that we put a lot of thought and care  
6 into reading your Honor's opinions and these are all new  
7 aspects of our motion.

8           I want to sort of segue at this point in time into  
9 one of our classes, the post-EOB billing class. That is  
10 the one -- this is hearing chart two for those following at  
11 home and, your Honor, we read not only your Honor's opinion  
12 but defendants' statements in their briefing, their expert  
13 statements and the hearing transcript, and uniformly what  
14 they said, and we have excerpted some of their statements  
15 in this hearing exhibit number two, is if you want to talk  
16 about patient billing, you cannot start before issuance of  
17 the EOB.

18           The EOB is the critical document, according to  
19 defendants, that tells Quest if it can bill, when it could  
20 bill and how much it could bill.

21           And excerpted on hearing chart two is, we have  
22 statements from Quest, from their counsel, from their  
23 expert. They say uniformly the EOB is the critical  
24 document, the one that Mr. Melodia said last time we could  
25 take it to the bank that what is on the EOB is the amount

1 the patient owes, nothing more, nothing less.

2 Fine, we said. We're limiting our class, our EOB  
3 billing class, to just those people who were billed after  
4 the EOB in an amount in excess of what the EOB said was  
5 patient's responsibility, and because your Honor's  
6 ascertainable loss statements and opinion, only those  
7 people who paid in excess of what they owed.

8 Now, the defendants said, well, nobody should be  
9 billed above the EOB. That's what their statement said,  
10 and, yet, in their opposition to our present motion,  
11 somewhat astounding to plaintiffs, they say there are tens  
12 of hundreds of thousands of people who fit into this class.  
13 By the way, tens of hundreds of thousands of people is  
14 millions to us.

15 It's quite an astounding thing to hear them say after  
16 they repeatedly told your Honor nobody should be billed --  
17 the EOB is the document. The insurance company is the  
18 adjudicator. It's the one we rely upon. It's the one that  
19 summarizes the provider agreements, the patient's benefit  
20 plan, all of those things.

21 It's the one that we relied upon and, yet, now they  
22 say there may be millions of people who were billed in  
23 excess of EOBs and who paid in excess of EOBs.

24 THE COURT: Well, then you satisfied numerosity.

25 MR. TUSA: Thank you, your Honor. I don't think -- I

1 don't believe that one is contested.

2 Not to be too glib about this, what defendants do say  
3 is you haven't solved the problem because we -- before we  
4 criticized you for relying on the provider agreements and  
5 the state separate billing laws, and now they say, oh, no,  
6 now you got to look at those again.

7 In some respects this is a sort of damned-if-you-do,  
8 damned-if-you-don't approach by the defendants.

9 We did what they said. We did what the Court said.  
10 We defined our class running from the EOB and we're only  
11 including people like Mr. Grandalski, who is our class rep,  
12 who was billed afterwards in excess and paid.

13 Why did they pay? They got a bill from Quest saying  
14 they owed the money. You could read the statements from  
15 their own expert, Dr. Dyckman. It's the last quote on our  
16 charge.

17 It says, "In addition to the requisition, the EOB is  
18 of critical importance in regard to laboratory patient  
19 billing. It instructs the laboratory whether to bill the  
20 patient and how much to bill the patient based on the  
21 patient's benefit coverage and the pricing provisions of  
22 the payer's contract with the laboratory."

23 He doesn't say and, of course, in practice Quest  
24 doesn't have to pull out its provider agreement every time  
25 they bill a patient. That's not what happens. They rely



1 on the EOB.

2 So, for them to now say we couldn't possibly have an  
3 EOB -- a post-EOB billing class without looking at the  
4 provider agreements and the state anti-balance billing  
5 laws, it's not only disingenuous, it's not what they do in  
6 practice. They do bill everybody based on the EOBs.

7 Now, they said there are millions of people in this  
8 class. What they didn't say and what we expected them to  
9 say is, listen, we may screw this up but in the days and  
10 weeks that follow, we fix it because we eventually can  
11 match everything up and we fix it.

12 Indeed, you know, their director of technology, this  
13 gentleman, Mr. Hanlon, had said, and we quoted this as well  
14 in our reply brief, he says, "For every claim, we know all  
15 cash and adjustments and whether or not the cash that was  
16 logged was insurance cash and patient cash."

17 But we didn't see a defense from Quest that they gave  
18 the money back. So, what we have is a scenario and class  
19 here where all of these people like Mr. Grandalski, who is  
20 our rep, was billed in excess of what his insurance company  
21 told Quest they could bill him. He paid it. He never got  
22 his money back.

23 I should mention that this is not the first time he's  
24 complaining about this. Mr. Grandalski complained to the  
25 company and to their debt collectors, Quantum and CBC, who

1 Quest used to chase him and his wife down four times for  
2 ten extra dollars.

3 When those complaints hit a brick wall, he complained  
4 to the Nevada Attorney General because he was living in  
5 Nevada at the time. He was posted to Nevada.

6 The Nevada Attorney General -- I know your Honor is  
7 not keen from our last hearing on hearing what state  
8 officers say about these kinds of things, but the Nevada  
9 Attorney General decided that what Quest did to Mr.  
10 Grandalski and what the debt collectors did to Mr.  
11 Grandalski was, quote, unquote, "illegal deceptive  
12 practice."

13 They told -- their counsel told Nevada Attorney  
14 General they were going to refund Mr. Grandalski's money.  
15 They never did. I don't think that point is at issue,  
16 either, and I sort of just want to highlight Mr.  
17 Grandalski's experiences a little bit because he is the  
18 plaintiff for three of our four classes.

19 So that's my hearing chart number three, your Honor.  
20 Four dates of service. He was insured by Anthem Blue Cross  
21 Blue Shield every time, which dovetails into our Anthem  
22 Blue Cross class. The date of the EOB and the amount the  
23 EOB is set. In every case there was \$20, that was his  
24 co-pay.

25 The date the EOB was -- if you notice the date that

1       either Quest or one of their two debt collectors, Quantum  
2       or CBC, billed him, are months after the EOB was received.  
3       And what they did is they tacked on an extra ten bucks  
4       because they decided they had to send it to their debt  
5       collectors and they were going to tack on an extra ten  
6       bucks.

7               That dovetails a little bit into our FDCPA claim, but  
8       more on that later.

9               Their own expert, Dr. Dyckman, says this look like  
10      this was a problem. Your Honor, in your prior opinion,  
11      noted the fact that Quest did not deny that the last time  
12      around we called a similar class this, which for the equity  
13      were remedy subclass, we had bankruptcy people shoved in  
14      there. Your Honor didn't like that. We threw the  
15      bankruptcy people out.

16              Your Honor noted that defendants don't contest Mr.  
17      Grandalski as a member of this subclass who was billed  
18      after the EOB in excess of the EOB and paid. So, that's  
19      our class rep.

20              We don't possibly see -- you know, listen, we think  
21      that we meet all of the Rule 23(b)(3) and (a) criteria for  
22      this EOB billing class. We don't possibly see how we  
23      cannot.

24              Defendants raise one of the most rogue defenses that  
25      you normally see. They're, like, well, everybody's damages

1 will be different. Yes, that's true, but that is hardly  
2 ever a reason to deny class certification. There are  
3 opinions ad nauseam stating that fact.

4 And otherwise, they generally rely on the fact that  
5 they think they are going to have to go back and pull  
6 provider agreements and look at state balance billings laws  
7 which they continually told you -- well, they certainly did  
8 tell you when we sought out prior classes that they didn't  
9 have to do. They said the EOB was the important document.

10 This is a common issue. It's a common problem. It's  
11 a unitary -- it's a unitary claim on behalf of this class.  
12 We think it satisfies predominance.

13 As far as superiority goes, your Honor made note of  
14 the fact Mr. Grandalski was overcharged ten dollars. You  
15 know, it's an amount that is so small, that nobody is  
16 otherwise going to sue on its own behalf for ten dollars.  
17 It happened to him four times.

18 I'm, of course, reminded of Judge Posner's decision  
19 in the Carnegie case, only a lunatic or fanatic sues for  
20 ten dollars. The alternative to a class action are not in  
21 that case 17 million cases, but no cases. Nobody sues for  
22 ten dollars, certainly not a corporate behemoth like Quest.  
23 It's just not worth it. The only way this is viable is in  
24 a class context.

25 THE COURT: Let me ask you a question.

1 MR. TUSA: Surely.

2 THE COURT: If I recall correctly, this gentleman is  
3 a class rep for all the classes except for the --

4 MR. TUSA: Medicare.

5 THE COURT: -- the Medicare class. Okay. Let's take  
6 the RICO class.

7 MR. TUSA: Yeah. Well, the RICO claim. There's not  
8 a RICO class.

9 THE COURT: Okay. The RICO claim. Okay. Now, the  
10 RICO claim is predicated upon multiple mail frauds as the  
11 predicate offenses. Correct?

12 MR. TUSA: Mail and wire fraud, yes, your Honor.

13 THE COURT: Okay. And of course, that requires  
14 scienter.

15 MR. TUSA: Yes. Of course, your Honor.

16 THE COURT: Now, I'm trying to -- I was trying to  
17 identify exactly where in the complaint you had described  
18 the scheme and artifice to defraud that was engaged in by  
19 Quest, and I do recall seeing it had a number of points  
20 that constituted the scheme and artifice to defraud.

21 MR. TUSA: Yes, your Honor.

22 THE COURT: Including at its core billing when you  
23 weren't entitled to bill.

24 My question is this. Now, to make out this claim,  
25 ultimately you're going to have to demonstrate that, in

1 fact, Quest possessed the requisite scienter.

2 MR. TUSA: Yes, your Honor.

3 THE COURT: And I'm trying to really in my own mind  
4 sort of scope out what the scheme is or, more particularly,  
5 is it pleading the scheme. And here is what is hitting me  
6 from looking at the pleadings.

7 There's no doubt that you indeed make factual  
8 assertions that they billed people in excess of their EOBs.  
9 On the other hand, there's also no doubt that thousands of  
10 people, tens of thousands of people, hundreds of tens of  
11 thousands of people, in defendants' words, were not billed  
12 in excess of their EOBs.

13 So, I am trying to see how the complaint in fact  
14 describes a scheme or artifice to defraud because the  
15 complaint does not suggest any particular rhyme or reason  
16 as to why Quest, when it sends out bills, sends out bills  
17 with a flying fickle finger of fate, ends up with me  
18 getting a bill in excess of my EOB and Miss Trivino,  
19 sitting 30 feet away from me, she gets perfectly fine  
20 bills.

21 I mean, and the complaint does not really describe  
22 something other than frankly the result, which is lots of  
23 people get EOBs and they get billed for amounts over their  
24 EOBs. Others don't. And I'm sitting here, particularly in  
25 the context of trying to figure out, well, how do we go

1 about actually managing this case? How do we prove a  
2 scheme? What constitutes the kinds of proofs that would,  
3 in fact, prove a scheme which had in fact the requisite  
4 scienter to constitute a criminal violation since, as we  
5 all know, while you've got a civil RICO, all that is is a  
6 civil remedy to a criminal offense and you, in fact, have  
7 to demonstrate that the criminal scienter existed.

8 Now, explain that to me, how this becomes, in fact,  
9 something which is manageable and, perhaps more  
10 significantly, how this is a class other than a class of  
11 people who are described by virtue of, in fact, having been  
12 found to have been victimized. In short, not a discrete  
13 class as it were.

14 MR. TUSA: Your Honor asked a lot in your  
15 explanation. I'll try to answer as best I can.

16 I think your Honor inherently asked a pleading  
17 question and a class question. You asked where in our  
18 complaint -- I presume your Honor was looking at the  
19 operative first amended class action complaint I believe  
20 filed in 2005, before any discovery was taken.

21 THE COURT: Actually, I was looking at the second  
22 amended --

23 MR. TUSA: The proposed, yeah, the proposed amended  
24 pleading. That's the one we submitted, of course, with our  
25 motion for intervention. As your Honor is aware, Rule

1       24(c) requires us to submit that.

2               Now, I will tell you, save your Honor for updating  
3       the class allegations and the dates of issue of service,  
4       given Judge Lifland's motion-to-dismiss opinion, we did not  
5       substantively change most of the allegations in that  
6       complaint. We certainly could.

7               I mean, of course, we're aware, and we have not at  
8       this point in time tried, your Honor. Rule 15, we can  
9       conform the complaint to the evidence. We haven't tried to  
10      do that. There hasn't been a suggestion -- well, firstly,  
11      discovery is still in the middle, but we haven't had --  
12      there's been not a suggestion --

13              THE COURT: Let's assume that you do. Let's assume  
14      you do that, you amend the complaint to, in fact, assert  
15      that there's a scheme and artifice to defraud patients who  
16      go to Quest by billing them for amounts in excess of the  
17      EOBs which were electronically issued by their respective  
18      insurers.

19              MR. TUSA: And I think your Honor asked the same  
20      question probably two years ago when we were here on our  
21      last motion.

22              THE COURT: Did I? My memory isn't that good  
23      anymore. That's what happens.

24              MR. TUSA: And of course, I think the answer is  
25      dramatically different for those classes than it is for



1       this class.

2               Last time we said, what is the -- Quest has these  
3       nine corporate billing practices that ultimately are the  
4       result of all of these billing problems. They are all  
5       pre-EOB issuance. Okay.

6               And if I remember -- and I'm paraphrasing your  
7       opinion now -- you said those were nothing -- billing  
8       mistakes happen for a variety of reasons, I believe was  
9       your Honor's quote or paraphrasing, and pre-EOB --

10              THE COURT: Not with me. With me, they're, as far as  
11       I'm concerned, the improper bills I get are a conspiracy,  
12       but I don't know about the rest of the world.

13              MR. TUSA: I understand completely, your Honor. So  
14       your Honor took us to task last time, and I think in your  
15       Honor's opinion -- and certainly this was defendants'  
16       position -- that pre-EOB, billing mistakes happen for a  
17       company this large who does this many transactions, your  
18       Honor was willing to cut them the benefit of the doubt.

19              I don't think plaintiffs were. I think they should  
20       do their job better and if they don't do their job better,  
21       they should have to be responsible for mistakes they make.

22              Your Honor was not of that opinion, I think it's fair  
23       to say, in the pre-EOB world. In the post-EOB world, I  
24       think it's dramatically different. Okay. Quest has said,  
25       their counsel has said, their experts have said, how does

1 Quest know what the right number to bill is?

2 They had actual knowledge when they get the EOB,  
3 actual knowledge, and if they don't have actual knowledge,  
4 they've recklessly disregarded it.

5 Page 27, footnote 11 of our opening class cert.  
6 brief we cite a gentleman by the name of Gerald Diffley.  
7 He's defendants' director of corporate compliance. He said  
8 all the EOBs or ERAs come in at one central place, a  
9 department they call remittance applications is what Quest  
10 calls it.

11 One department gets all of these things. They then  
12 turn around, if the EOB tells them they could bill, they  
13 bill. They use a billing vendor, this outside company that  
14 we have made reference to called Regulus. Quest doesn't  
15 actually send out their own bills. They send a very, very  
16 large electronic file to this billing vendor, I believe  
17 once or twice a day. This billing vendor, Regulus,  
18 actually sends the bills, I believe the testimony was, from  
19 somewhere in the Midwest.

20 Now, we may be able to cut them some slack in the  
21 pre-EOB world. In the post-EOB world, there is absolutely  
22 no excuse to give them the same degree of respect. They  
23 have what they have self-described as the critical document  
24 in their hands to know the amount of the bill, the EOB, the  
25 ERA.

1           For all of the people in this class, they are making  
2           a decision, either with knowledge or with actual disregard  
3           for the piece of paper they have in their hand, as to what  
4           this person owes and when they owe it.

5           Now, Quest has decided and it uses debt collectors  
6           and it uses this outside billing vendor, Regulus, that they  
7           are not necessarily going to either in all instances comply  
8           with the EOB or spend the right amount of time in setting  
9           up the right compliance procedures to do it.

10          Now, I'm not -- we have -- you asked me what about  
11          people who they didn't mess up. They're not in a class.  
12          We're not looking to include those people.

13          THE COURT: I understand that.

14          MR. TUSA: Okay.

15          THE COURT: But my recollection is, and I may not  
16          word it as articulately as I would like, but my  
17          recollection is that in defining a class, as a general  
18          rule, one can't define a class by saying we're going to  
19          define the class by determining in fact which members have  
20          been victimized by a practice; that there has to be some  
21          unifying theme apart from the fact that there is  
22          victimization, certainly at least as to a Rule 23(b), a  
23          money damages class. Injunctive class may be somewhat  
24          different.

25          So, for example, you've cited to me Judge Hochberg's

1 decision and the Third Circuit's decision in the UCR  
2 cases. You're familiar with them. Correct?

3 MR. TUSA: I'm sorry. What does that stand for?

4 THE COURT: UCR is usual and customary --

5 LAW CLERK: Usual and customary rate.

6 THE COURT: Usual and customary rates. It was a  
7 class action in which the allegations were that the  
8 insurance companies were routinely using a database for  
9 determining what the usual and customary rates for medical  
10 practitioners in a particular area were, which where  
11 prepared, if I recall correctly, the allegation is by a  
12 company called Egenix or Ingenix.

13 MR. TUSA: I'm familiar.

14 THE COURT: And the allegation was and is, because I  
15 have some of these cases --

16 MR. TUSA: Yeah.

17 THE COURT: -- that this database was intentionally  
18 played around with and that, in fact, the actual usual and  
19 customary rates on an average were much higher than this  
20 company reported, that the insurance companies were in bed  
21 with the company and, therefore, everyone who was out of  
22 network and who submitted a claim got reimbursements at a  
23 much lower rate and the doctors got a much lower rate.

24 Now, there's a scheme. All right. There's a  
25 unifying theory, might prove to be true, might prove to not

1 be true, but the unifying aspect of that was an allegation  
2 that this database was in fact manipulated to lower across  
3 the board in various geographic areas the calculation of  
4 what the usual and customary rate of various practitioners  
5 were and, therefore, people who got billed based upon that  
6 ended up arguably being victimized. Now --

7 MR. TUSA: I believe your Honor is referring to the  
8 Wachtel case.

9 THE COURT: Yes. Indeed, and you cited Wachtel.

10 MR. TUSA: Not in these briefs, we didn't, your  
11 Honor, but in our -- I believe now you're testing my  
12 memory.

13 THE COURT: Actually, I think you got Wachtel in here  
14 also, if I recall correctly. That's vague recollection but  
15 we don't have to test my memory. You may only prove that  
16 it's failing.

17 MR. TUSA: That's fair, your Honor.

18 THE COURT: What I'm trying to understand is --  
19 okay -- look --

20 MR. TUSA: Sure.

21 THE COURT: -- I understand that you are indeed  
22 pleading a particular result, which is that people got  
23 overbilled. All right. And you certainly are suggesting  
24 that it was the result of improper conduct. But the  
25 complaint doesn't particularly allege what conduct -- what

1       scheme it is that results in this injury, and I'm sitting  
2       here saying, okay, there's no doubt I've got you alleging  
3       that people are injured.

4               Now, they have to have criminal intent. They have to  
5       intend to defraud or to create a scheme or artifice to  
6       defraud of money and property now, unless they've got a  
7       bribery scheme under current Supreme Court law. All right.  
8       And I'm trying to see how does that play in terms of how do  
9       you prove intent.

10              MR. TUSA: Your Honor is staying on the RICO so I can  
11       appreciate that. I believe you're asking us what we  
12       believe the schemes -- your Honor, in your prior opinion,  
13       spoke some about RICO and scienter. Your Honor cited the  
14       appropriate test in the Third Circuit and it is actual  
15       knowledge or reckless disregard.

16              We don't understand, I say we, I mean plaintiffs, we  
17       don't understand that a prerequisite for a RICO claim is  
18       that every one of a defendant's customers must be the  
19       victim of a particular scheme, and I don't know that your  
20       Honor is suggesting that.

21              THE COURT: I'm not suggesting that.

22              MR. TUSA: I mean, in Wachtel and, of course, the  
23       11th Circuit's decision in Clay, very similar case, yes, it  
24       was essentially every single doctor, or Wachtel's case, I  
25       believe every single private insured in that particular

1 case.

2 Now, it doesn't have to be that case. Now, your  
3 Honor recognized under the Third Circuit's standard of  
4 scienter it could be actual intent or it could be reckless  
5 disregard, and I think -- I don't know that we have enough  
6 right now to say actual intent because we haven't certainly  
7 gotten that discovery, but I think what we do have, and I  
8 think what we have demonstrated certainly to the Third  
9 Circuit's Hydrogen Peroxide standards, Quest has said this  
10 should never happen. They now just said this happens  
11 millions of times.

12 We are either to suggest that that is a standard of  
13 deviation, we as the plaintiffs, and the Court is willing  
14 to live with, or they are intentionally turning their head  
15 the other way and not realizing this massive mistake, which  
16 coincidentally financially benefits them and hurts the  
17 class and consumers. Lucky for them, I suppose.

18 I believe it's our opinion that they either know or  
19 should have known they have intentionally disregarded this  
20 major error and that's enough for scienter for a RICO  
21 claim. Your Honor is asking about RICO.

22 Of course, the other claims we seek for both this  
23 post-EOB billing class and some other classes are non-RICO-  
24 based, they're also non-scienter-based. But your Honor is  
25 asking about RICO. I can appreciate that.

1 I think that is our answer. They have a department  
2 that deals with this. They are supposed to get this right.  
3 They are telling you that they do get it right.

4 And now they're telling you that millions of people  
5 have been billed in excess of EOB, paid in excess of EOB,  
6 and we've heard no statement that they got their money  
7 back. Certainly Mr. Grandalski didn't.

8 Why should we give them the benefit of the doubt and  
9 say these millions of people, these millions of errors,  
10 hundreds, thousands, millions a day, why should they be  
11 permitted to retain that money? That's not their money.

12 Now, that's perhaps more of an unjust enrichment  
13 concept that's equitable. But if they have intentionally  
14 disregarded what is under their noses, that's scienter.  
15 That's knowledge. That's fraud. I think that's our  
16 position.

17 THE COURT: Let's go to the unjust enrichment class.  
18 To a certain degree doesn't that get us back into specific  
19 contractual provisions and state laws barring balance  
20 billing?

21 MR. TUSA: I'm sorry, your Honor. Someone opened the  
22 door. I couldn't hear your question entirely.

23 THE COURT: Doesn't that get us into issues of  
24 specific contractual provisions about balance billing and,  
25 likewise, issues about state statutes dealing with balance



1       billing?

2               MR. TUSA: No. It is certainly plaintiffs' position  
3       that it does not. Why? Again, we come back to what the  
4       defendants repeatedly have said. You don't need to look  
5       when you adjudicate a claim, when you send out a bill, you  
6       don't need to look at the provider agreement. You don't  
7       need to look at the state balance billing law.

8               Certainly they don't look at those things when they  
9       send out their bills everyday. They look at the EOB.  
10      According to their expert, Dr. Dyckman, we quote in the  
11      paragraph exhibit chart two, the EOB reflects all of those  
12      things.

13              Mr. Melodia said at the hearing last time all of  
14      those things are wrapped up in the EOB. If it weren't the  
15      case, it would be such an unwieldy system, we would never  
16      be able to send out a bill. If they had to look at the  
17      contract, the state law, every time they wanted to send a  
18      bill, they would never send out a bill, certainly not a  
19      timely bill. All of that information is wrapped up in the  
20      EOB.

21              Mr. Melodia said we are dependent on the EOB. The  
22      EOB says what you owe, what you can bill, how much you  
23      could bill.

24              Of course, unjust enrichment is an equitable remedy.  
25      It says they have money that they should not have had and

1       they should return it. If you have paid more than the EOB  
2       says you owe, if you paid it, if they have not given you  
3       your money back, they are unjustly enriched. From the  
4       matter of equity, they should give the money back.

5               THE COURT: What happens if you got two carriers,  
6       primary and secondary?

7               MR. TUSA: I'm sorry. Is your Honor done with this  
8       question?

9               THE COURT: Yeah. What happens if you've got two  
10      carriers, primary and secondary, and they both issue EOBs?

11              MR. TUSA: I presume your Honor's question is such  
12      that the first carrier allowed Quest to bill and the second  
13      carrier said no. I presume two carriers with different  
14      results.

15              THE COURT: Let me put this way. Have you ever had  
16      two carriers?

17              MR. TUSA: Personally no, your Honor. But some of  
18      our plaintiffs do. I'm familiar with the scenario.  
19      Primary insurance, secondary insurance, happens to a lot of  
20      people on Medicare.

21              THE COURT: Coordination of benefits issues.

22              MR. TUSA: Sure.

23              THE COURT: If they bill in excess of an EOB, does  
24      that necessarily mean that they have in fact improperly  
25      billed?

1           MR. TUSA: The answer is still yes, and the reason is  
2 if the secondary insurer adjudicates the claim after the  
3 primary insurer adjudicates the claim to determine that  
4 there is no responsibility because they had an agreement  
5 with Quest, and that adjudication is reflected in their  
6 EOB, no. If the answer is zero, you shouldn't be billing.

7           Now, maybe Quest desires a little bit of leeway.  
8 Maybe it should have a couple of -- it gets -- according to  
9 Mr. Hanlon, they know all insurer cash received, all  
10 patient cash received, so, maybe you say, fine, they should  
11 have some time after the second EOB to make this right.

12           We're willing to let Quest say, fine, we gave these  
13 people their money back because there were two payers.

14           That's not what they've said. I don't think they  
15 denied that if the secondary carrier is a contracted  
16 carrier, participating providers, they have to also comply  
17 with the secondary carrier, the first carrier. They don't  
18 distinguish between their legal obligations to comply with  
19 both.

20           I don't think they also agree with the fact that  
21 those obligations are also wrapped up in the EOB. If there  
22 is a difference, Quest has to comply with it because  
23 they're both participating carriers. They're both  
24 contained in the EOB.

25           At best, at best, and this is not Mr. Grandalski's

1 scenario, but at best they bill, they receive some money.  
2 They shouldn't get it. They should give the money back.  
3 And if they didn't refund it, they should refund it.

4 I don't see any other scenario that is equitable, if  
5 you're talking about equity, and if you're talking about  
6 legal, acceptable under the state consumer --

7 THE COURT: What I'm asking is do I have to --  
8 forgetting then about state statutes. Do I have to look at  
9 the contracts?

10 MR. TUSA: I don't think you do.

11 THE COURT: Do I have to look at coordination-of-  
12 benefit issues?

13 MR. TUSA: We don't think you do. And the reason --  
14 I mean, I could give you a different explanation, but I  
15 keep on coming back to what defendants said, their expert  
16 said, their counsel said.

17 If they had to look at all of those things when they  
18 sent out a patient bill, it would never work. The whole  
19 system of patient billing that I guess we have and Quest  
20 has would never work.

21 All of those things are contained in the EOB because,  
22 you know, to borrow defendants' terms, it's in its hearing  
23 exhibit 2, the insurance provider is the adjudicator.  
24 That's the term they use. They know all of those things.  
25 They have incorporated all of those things.

1           The EOB is the only document you need. That, when  
2           we redefine these classes, we considered your Honor's  
3           manageability concerns, and that's the document you need.

4           Now, listen, I realize Quest will say, both in  
5           response to this motion and probably any class motion, not  
6           doable, not doable, too difficult, too big, too unwieldy.

7           THE COURT: I think your prediction is a hundred  
8           percent correct.

9           MR. TUSA: Thank you very much. I've also read their  
10          papers so I'm cheating a little bit. But I think we need  
11          to hold them to their prior representations which, quite  
12          honestly, at least in this context are right.

13          THE COURT: Okay. Let me just, a couple of other  
14          quick questions that I want to ask you, then I'm going to  
15          give defense counsel a very brief time to be heard.

16          Let me ask this. The debt collector class --

17          MR. TUSA: Yes, your Honor. I'm listening. I want  
18          to change charts. Please go ahead.

19          THE COURT: I'll make sure I get the mic a little bit  
20          closer to me. Do you have another chart for me?

21          MR. TUSA: Two, but go ahead.

22          THE COURT: Okay. You're going -- I will tell you,  
23          for the future, you're going to have to make charts for  
24          geriatric judges. All right. That's way too far for me to  
25          see.

1 MR. TUSA: That's why we have the handouts as well.

2 THE COURT: Okay.

3 MR. TUSA: So that you have them in front of you as  
4 well.

5 THE COURT: Now, I've got essentially two claims in  
6 your debt collector --

7 MR. TUSA: Yes, we do.

8 THE COURT: -- class right now. One is misleading  
9 threatening language.

10 MR. TUSA: Yes.

11 THE COURT: All right. Either threatening something  
12 which they were not authorized to do or threatening  
13 something which they had no intention to do.

14 MR. TUSA: True. Yes, your Honor.

15 THE COURT: All right. And the second is charging  
16 unauthorized fees for collection essentially.

17 MR. TUSA: Yes.

18 THE COURT: And as I understand it, by the way, I've  
19 got Quest and the debt collectors pointing figures at each  
20 other as to whose the source of these bills.

21 MR. TUSA: Certainly not necessarily at one another  
22 but at Quest, yes.

23 THE COURT: Okay. If I recall correctly, I've got  
24 five debt collector defendants. Is that correct?

25 MR. TUSA: Well, you dismissed one.

1 MR. CIPPARULO: There's five left, your Honor.

2 THE COURT: There's five left. Good. All right. I  
3 had granted summary judgment with regard to one of the  
4 plaintiffs already.

5 MR. CIPPARULO: That was Credit Collection Services,  
6 your Honor.

7 THE COURT: Okay. Now, I've got two other  
8 plaintiffs. Is that correct?

9 MR. TUSA: The representatives for this class?

10 THE COURT: Yes, for this class.

11 MR. TUSA: Three, actually, your Honor. Mr.  
12 Grandalski, Miss McKenna and Mr. and Mrs. Ranieri.

13 THE COURT: Okay. And they received dunning letters  
14 from how many defendants?

15 MR. TUSA: Mr. Grandalski from two different  
16 defendants, Quantum and Credit Bureau Central, and then the  
17 other two class reps, Miss McKenna and the Ranieris, from  
18 American -- AMCA, American Medical --

19 THE COURT: Okay.

20 MR. TUSA: So, three total.

21 THE COURT: So, I've got two debt collector  
22 defendants in this case who nobody makes any allegations  
23 against.

24 MR. TUSA: I think not that we don't make any  
25 allegations. We don't have a class rep that dealt with

1       them.

2               THE COURT: No, I don't have a plaintiff. I do not  
3       have a plaintiff who makes any claim against them.

4               MR. TUSA: And you're referring to --

5               THE COURT: It's not a question of standing. I know  
6       you're arguing it as standing but, in short, it's one thing  
7       whether or not you have standing to assert a cause of  
8       action under law of state A, B or C.

9               It's another thing to say we've got a defendant in  
10      this case who nobody is a class rep against.

11              MR. TUSA: Okay. Let me -- I think your Honor is  
12      asking me the following two questions. Let me try to be  
13      succinct about it.

14              You're asking if we have a class rep that dealt  
15      individually with defendant RCA or SSB, and the answer is  
16      we do not. Okay. I want to be clear about that. We don't  
17      proffer anybody who dealt with them.

18              Why do we think that's okay. I think that's what  
19      you're asking. The scheme or artifice is the same and, you  
20      know, I think what our position is, the legal claim is the  
21      same, albeit the defendant is different.

22              We have -- it's our opinion, and we rely in no small  
23      way on your Honor's opinion in Sheet Metal Workers, citing  
24      Ortiz v. Fibreboard, saying if the classes were certified,  
25      there would be class members who would have dealt with them



1 and, therefore, it's a sort of cart-before- the-horse  
2 argument.

3 That's our view of it and, so, we do believe it's a  
4 standing defense.

5 THE COURT: If I recall correctly, all right, it's  
6 one thing to say, hey, I've paid your bills and the issue  
7 is whether or not I've got standing under a particular  
8 statute to pursue a claim against you, and to say I've got  
9 nothing from you.

10 And let me ask you this. Suppose I had no plaintiff.  
11 Suppose I had no plaintiff against any debt collector, no  
12 one who ever got dunned. Could I have a class action  
13 against the debt collectors for engaging in a scheme?

14 MR. TUSA: I think you'd lack practicality because  
15 nobody would have had that common legal problem. I mean,  
16 so -- but I don't think that's our factual scenario.

17 THE COURT: But how do I deal with typicality, for  
18 example? How do I deal with atypical defenses, for  
19 example, where there's nobody who in fact purports to  
20 assert a claim against two defendants in this case?

21 MR. TUSA: Well, I think the answer is somewhat  
22 dependent on what legal claim we're speaking about. If  
23 we're speaking about the FDCPA --

24 THE COURT: That's what I'm talking about. That's  
25 what I'm talking about.

1           MR. TUSA: It's a strict liability statute and, by  
2           the way, my two charts here, your Honor correctly  
3           identified the two things that we now still complain about.

4           We wanted to, in charts five and six for defense  
5           counsel, point out the fact that charging threats are  
6           expressly verboten by (e)(5) and (e)(10); adding additional  
7           penalties expressly verboten by (e)(2) and (f)(1).

8           I just wanted to make that clear, that what we're  
9           complaining about now are really the most rote of list  
10          enumerated FDCPA defenses.

11          Strict liability statute, this Court's decision, I  
12          don't mean your Honor, I mean this district's decision in  
13          Pace, the Supreme Court's recent decision in Germane,  
14          whether or not -- and I think our point for our class is  
15          it's the conduct that's the mistake and the conduct is the  
16          same.

17          We have plaintiffs who were victims of the conduct.  
18          They all did the same things. They were all working for  
19          Quest. We think that's the answer.

20          Now, your Honor, I understand what you're saying  
21          about those two --

22          THE COURT: Could they sue every debt collector who  
23          engages in that kind of conduct even if they weren't  
24          associated with Quest?

25          MR. TUSA: I'm sorry. They being who, your Honor?

1 THE COURT: Your three reps.

2 MR. TUSA: Well, I think if there was a commonality  
3 in the violation, the answer is anybody who -- well, if  
4 you're saying if they were not dealing with Quest?

5 THE COURT: Yeah. I mean, suppose, for example --

6 MR. TUSA: Fair enough.

7 THE COURT: Let me give you my hypothetical, all  
8 right, which is, if I recall correctly --

9 MR. TUSA: Yeah.

10 THE COURT: -- you specifically defined me out of  
11 your class, didn't you?

12 MR. TUSA: I don't believe we did but when your Honor  
13 raised the issue, we did waive recusal.

14 THE COURT: Okay. Let's suppose I am a member of  
15 your class. All right. Now, I get this letter which tells  
16 me to pay \$10 in collection fees.

17 I am indeed properly outraged and I sue that debt  
18 collection agency and, you know something, I am  
19 sufficiently outraged at this practice so that I conduct a  
20 diligent search to find out the name of every other debt  
21 collector in the country who tacks on collection fees and I  
22 sue all of them in a class action, saying each of them, as  
23 a regular practice, adds on \$10 in collection fees to their  
24 dunning notices and bills.

25 It's the same practice. It's the same scheme. It's

1 the same legal issue. Can I get certified?

2 MR. TUSA: I think there are certain notions that,  
3 yes, you can get certified.

4 THE COURT: Okay.

5 MR. TUSA: Now, would every --

6 THE COURT: Now, let's put it this way. At least I  
7 have your position, which is that, at least in my view, if  
8 I placed it as a reductio absurd, you're still willing to  
9 go along with it.

10 MR. TUSA: Your Honor, I don't believe it's that  
11 absurd. I will have to say, quite different from your  
12 Honor's factual scenario, we have another tie-in  
13 characteristic in that all of these companies were doing  
14 this under the supervision of Quest. I don't believe the  
15 case law says, however, even in the FDCPA context, that the  
16 debt collectors' practice must be tied to a single client.

17 I mean, except in the scenario where a debt collector  
18 purchases the debts and collects on its own behalf, they're  
19 working for a particular creditor. I don't believe the  
20 cases supports the notion. Certainly, I haven't seen that.  
21 I might be more fair and say it like that.

22 Where the debt collector really is tied to one  
23 particular creditor, it's the violation that they're going  
24 after.

25 Briefly, while we're on the subject of the FDCPA, I

1 want to bring to your Honor's attention something we did  
2 say in our briefs. This past April the Supreme Court  
3 decided the Germane decision. It was the court's latest  
4 FDCPA decision, somewhat insightful on a number of points  
5 at issue here. For instance, it rejected the bona fide  
6 error defense.

7 Also very importantly, it expressly recognized -- the  
8 Third Circuit had done this as well -- but for the first  
9 time the Supreme Court expressly recognized a practice that  
10 is deceptive, unfair or misleading under the FDCPA is also  
11 as such under the FTC Act and, of course, your Honor is  
12 well aware we have little FTC Act claims, which is why, of  
13 course, for this particular class we don't only seek  
14 certification under the FDCPA, we also seek certification  
15 under the state consumer protection laws, because if it's  
16 deceptive, it's still deceptive.

17 That was previously the Third Circuit's position in a  
18 case called FTC v. Check Enforcement. It's in our brief.  
19 I won't belabor the point. I know your Honor is looking to  
20 wrap up. I just --

21 THE COURT: I'm not going to cut you guys short. All  
22 right. Let me just stop you for one second.

23 (Discussion off the record.)

24 MR. TUSA: A few words, your Honor, on our class, the  
25 Anthem Blue Cross Blue Shield class. There was no doubt in

1 your Honor's last opinion that your Honor was of the  
2 impression that a class dependent on too many contracts and  
3 too many state laws was not going to fly for class  
4 certification, certainly not in this court.

5 We took those statements to heart. We have a class,  
6 one provider agreement, one sub-plan. And the defendants  
7 have made the point, and I just want to address this real  
8 quick, that Mr. Grandalski, even though a member of the  
9 plan, could not be a third-party beneficiary to raise a  
10 breach-of-contract claim.

11 This is the only class for which we have a breach-of-  
12 contract claim, and we set out here, your Honor, from the  
13 contract -- this is also Tusa exhibit 10, but here is the  
14 hold harmless clause. Here is the definition of payment  
15 covered services member, and it very clearly says  
16 laboratory may not -- I'm paraphrasing -- may not bill for  
17 anything other than copays for deductibles.

18 We know for Mr. Grandalski that was \$20 in all four  
19 of his instances. They billed him for \$30. It says  
20 expressly, laboratory agrees this provision shall be  
21 construed for the benefit of the member. That's Mr.  
22 Grandalski. The contract says expressly it's for the  
23 benefit of the member.

24 Now, this is -- we agree that Connecticut law  
25 applies.

1 THE COURT: What subdivision is this?

2 MR. TUSA: This is my chart exhibit four. It's also  
3 the full agreement is Tusa exhibit 10.

4 THE COURT: What subdivision of the contract?

5 MR. TUSA: I'm sorry, your Honor. It is -- let me  
6 pull out the full one. The hold harmless clause is section  
7 2, sub B, sub 4. Are you with me, your Honor?

8 THE COURT: I got it.

9 MR. TUSA: Okay.

10 THE COURT: Mr. Melodia, it looks like you've got a  
11 contractual provision interpretation issue here.

12 MR. MELODIA: Well, at best, I think, your Honor,  
13 we've got a factual issue around this contract.

14 I think, more importantly, in looking at the papers  
15 preparing for today's hearing, it's not clear to me at all  
16 how this contract found at Mr. Tusa's exhibit 10 or today's  
17 exhibit 4 even applies to their sole named representative,  
18 Mr. Grandalski.

19 It's not clear to me that this plan even covers  
20 Grandalski. Grandalski is in Nevada. He's a federal  
21 employee. It's not clear to me that this contract is one  
22 that governs federal employees or Mr. Grandalski in Nevada.  
23 I don't think --

24 THE COURT: Let me ask you a more fundamental  
25 question. With regard to a class consisting of members who

1 are only covered by a particular plan, the Anthem plan, a  
2 particular contract in the Anthem plan, if I recall  
3 correctly --

4 MR. TUSA: Yes, your Honor, and exhibit 11, the next  
5 one, is the amendment that deals with federal employees.

6 THE COURT: Okay. But really when you get right down  
7 to it, isn't that an issue which goes purely to the merits  
8 of the claim?

9 In short, you may have a summary judgment. You may  
10 have a motion to dismiss on, you know, depending on the  
11 actual language in this one plan. But does that go to any  
12 of the issues which fundamentally deal with class  
13 certification?

14 MR. MELODIA: I think it does very much, your Honor.

15 THE COURT: How so?

16 MR. MELODIA: They like to call this a post-EOB  
17 class, as if all we need to do is look at the EOB, as we've  
18 heard, and if there's any bill as to that EOB, it's  
19 automatically wrongful and improper.

20 But we know that not to be true and we know that not  
21 to be true by looking at the actual named plaintiffs  
22 they've put forward during the six years of this  
23 litigation, including continuing to put them forward as  
24 members of this class, this post-EOB class, at exhibit 25  
25 to Mr. Tusa's declaration.



1           So, to go to your Honor's question, take the  
2           Agostinos. Why do we need to look at the Agostino payer  
3           contract and understand what's in it versus what is in  
4           hearing exhibit 4, which we believe to be actually the  
5           Breuer-Auclair plan, not the Grandalski plan, but in any  
6           event, whoever it applies to, and we still don't know six  
7           years into the case, the point is you need to look at  
8           different contracts in order to understand, for example,  
9           whether the Agostinos have a claim and are in the class at  
10          all, not merits, but whether or not there's membership in  
11          the class; ascertainability and specificity around class  
12          definition.

13          The Agostinos' contract, it turned out, was with a  
14          nonparticipating payer. That makes all the difference in  
15          the world as to whether they're in or out.

16          THE COURT: Well, you haven't contested that, was it  
17          Mr. Grandalski's contract is with this particular, this  
18          Anthem plan, have you?

19          MR. MELODIA: I am right now, your Honor. I  
20          apologize, but in looking at the exhibits in preparation  
21          for today, I don't see where the exhibits being put in  
22          front of you as the plan is one that necessarily applies to  
23          Mr. Grandalski.

24          THE COURT: Okay.

25          MR. MELODIA: In any event, there's not an Anthem

1 plan. We all know that. Remember last hearing, we looked  
2 at the Illinois Attorney General exhibit and we saw how  
3 many plans there are.

4 THE COURT: So, if I certify this as to the contract  
5 which Mr. Grandalski is a beneficiary of, whatever it may  
6 be, does that solve the problem?

7 MR. MELODIA: Well, it doesn't. I mean, it solves a  
8 problem.

9 THE COURT: What problem doesn't it solve?

10 MR. MELODIA: It doesn't solve the problem of the  
11 very practices, the mish-mosh of practices that are issue;  
12 the lack of a scheme, the lack of scienter under RICO.

13 THE COURT: Just a breach of contract. What I'm  
14 asking you is, forget the bells and whistles for a second.  
15 Okay. Excuse me for characterizing a civil RICO claim as  
16 bells and whistles.

17 MR. TUSA: No offense taken, your Honor.

18 THE COURT: Forget the bells and whistles. A  
19 breach-of-contract claim with that gentleman as a class  
20 representative for people who are covered by that contract  
21 who were billed in excess of their EOBs, pure breach,  
22 what's the problem with that?

23 MR. MELODIA: The problem is that, as the Court  
24 suggested earlier in a question, every time there's a bill  
25 in excess of an EOB, it's not a breach, and it's not an

1       improper practice.

2               Now, I'm not arguing merits. I'm arguing what does  
3       the Court need to look at in order to determine whether  
4       there's a breach of contract, and that analysis requires  
5       not just looking at the plain language of the contract, but  
6       requires the exact documents that plaintiffs don't want to  
7       put in front of the Court anymore because your Honor  
8       already accepted in your earlier opinion in February of '09  
9       that, in fact, you would need to look at the requisition  
10      and all the pre-EOB activity.

11              Why do we need to look at it? We need to look at it  
12      for the reasons that are obvious when looking at Mr. Tusa's  
13      exhibit 25, that go through the various proposed members of  
14      a post-EOB class.

15              We need to understand why they were billed more than  
16      an amount stated on an EOB. One of the reasons, for  
17      example, might be the situation your Honor brought up,  
18      Cruthers, which is competing EOBs from two different  
19      carriers.

20              Our expert, in fact, did not say what was  
21      characterized by Mr. Tusa earlier. Our expert said that a  
22      secondary carrier can't tell a primary carrier what to bill  
23      and can't direct Quest and, so, Quest is in the middle.  
24      That's one scenario, that coordination-of-benefits issue.

25              Another scenario is where there are multiples EOBs

1 conflicting with each other from the same payer. We have  
2 that scenario in this case with Hoecher. We have with Ms.  
3 McKenna, one of the named representatives put forward by  
4 plaintiffs today six years into this litigation. We have  
5 three different scenarios.

6 THE COURT: Got it. Okay. We're going to take a  
7 half-hour break because I wouldn't dream of shorting any of  
8 you in this interesting issue. All right.

9 (Recess is taken.)

10 THE COURT: Okay. Mr. Tusa, I pretty much kept you  
11 on the hot seat for this morning, so, before we give  
12 defense counsel an opportunity to experience that, is there  
13 anything which you wish to add which you think you may have  
14 missed or that I may have missed?

15 MR. TUSA: Three very brief points, your Honor.

16 THE COURT: I'm sorry?

17 MR. TUSA: I just want to make three very brief  
18 points.

19 THE COURT: Go right ahead.

20 MR. TUSA: Some topics we have not touched upon and  
21 then I will gladly cede the floor.

22 THE COURT: Okay.

23 MR. TUSA: When we broke we were talking briefly  
24 about the Anthem Blue Cross Blue Shield contract. Mr.  
25 Melodia expressed his opinion that he thinks maybe we're

1 talking about the wrong contract because it doesn't mention  
2 federal employees.

3 I would mention two things. Exhibit 11 to my opening  
4 declaration is the exhibit to -- is the amendment to the  
5 contract in exhibit number 10, expressly incorporating  
6 federal employees, so, we think it is the right contract.

7 The other only point I make is this is the first time  
8 we're hearing about it. We got these documents from  
9 defendants and we didn't hear in their opposition papers  
10 that they thought we had the wrong contract. If that's the  
11 case, we're hearing it for the first time.

12 Secondly, I won't belabor the point. I had one last  
13 hearing chart, your Honor, and it sort of dovetailed into  
14 the two issues about Medicare and intervention and we'll  
15 largely rest on our papers on these issues.

16 You know, your Honor might recall I have a motion  
17 pending to intervene one new plaintiff who would be our  
18 class rep for the Medicare class. It's our position that  
19 she satisfies the lone problem you had with our last  
20 Medicare representative. She undoubtedly was Medicare  
21 covered, was billed and paid. It was the unpaid part that  
22 your Honor had a problem with last time. Miss Camaj would  
23 satisfy that one problem.

24 Defendants don't take issue with any of what we  
25 believe is relevant. They pretty much attack her by

1 suddenly coming up with an advance beneficiary notice.  
2 This is all primarily in the papers, if not in the class  
3 motion papers, in the intervention motion papers.

4 The only additional point I'd like to make is  
5 defendants filed an unapproved surreply and I don't know if  
6 your Honor is going to accept it, not accept it.

7 I just have one thing to say about it. We had made  
8 the position in our reply papers in support of intervention  
9 to allow Miss Camaj in that while it seems that Quest has  
10 suddenly found this ABN after a year of Miss Camaj asking  
11 her for it, it's clearly defective on its face for at least  
12 two reasons.

13 Number one, they never gave her a copy of it, and  
14 that is an express requirement under the Medicare laws.  
15 And number two, if you don't give somebody a copy, the ABN  
16 is absolutely defective, and that's what the chart says.

17 THE COURT: Let me ask you this, though. One of the  
18 things about the Medicare class was cohesiveness and  
19 manageability issues.

20 This issue about the ABN raises two issues. One is  
21 whether or not -- actually raises a number of issues but  
22 first, one issue is whether or not she's an adequate class  
23 representative, since your class is defined as people for  
24 whom no ABN had ever been issued, if I recall correctly,  
25 not a class consisting of people who either had no ABN or

1 had defective ABNs.

2 Secondly, assuming that it were expanded to deal with  
3 that situation -- well, let me put it this way. First,  
4 does it potentially raise, among other things, whether or  
5 not she is not an adequate representative because she is  
6 subject to atypical defenses which the class would not be  
7 subject to -- let me continue -- and third, if this class  
8 were to include both people for whom no ABN had ever been  
9 issued and people for whom defective ABNs were issued,  
10 doesn't that create an issue of, in fact, embroiling this  
11 Court in individualized analyses of each individual  
12 claimant's position, particularly whether or not an ABN was  
13 defective, not defective or, indeed, as the defense has  
14 argued and, quite frankly, I don't remember it's in their  
15 surreply or whatever, but I do know that they had argued  
16 that under Medicare rules, if the beneficiary in fact has  
17 actual notice that the procedure is not covered, then even  
18 if they got a defective ABN, they are still properly  
19 billed. At least that's my understanding of what their  
20 argument was.

21 MR. TUSA: Your Honor asked a number of questions. I  
22 want to see if I could answer them all.

23 Let me take your last one first. Do they have to  
24 issue an ABN. We don't think there's any doubt that these  
25 are the Medicare regs. We've attached these, by the way.

1 The provider, practitioner or supplier must issue an ABN  
2 each time and as soon as it makes an assessment that  
3 Medicare payment certainly or probably will not be made.

4 We think they're just wrong. We think you must.

5 Now, you ask -- your Honor asked me a different  
6 question. Your Honor asked me a question about whether or  
7 not -- let me take a step back.

8 Miss Camaj and her physician asked Quest for copies  
9 of this ABN for eight months. They continually told her it  
10 didn't exist. We proffered her as a class rep.

11 After they told her it didn't exist, she asked  
12 Medicare. Medicare said we don't have one, either. Okay.

13 So we proffered her as a class rep. Lo and behold,  
14 even though Quest apparently misrepresented itself to Miss  
15 Camaj and her physician a number of times, they found one.  
16 But they attached it to Mr. Diffley's affidavit.

17 We took a look at it and to our eyes it's materially  
18 defective. And you asked me what's the import of that.

19 Our class is defined about people who don't have an  
20 ABN, and it's our view that if the ABN is defective, it  
21 doesn't exist at all. It's void. It's a nullity. It  
22 doesn't exist. So, in our view she can be the class rep.

23 But I think this is one of those Hydrogen Peroxide  
24 issues that your Honor has to deal with. I think this is  
25 one of those instances where the facts, the merits overlap



1 with the class determination and I think we need an  
2 individual determination as to whether or not she  
3 individually is a proper class representative.

4 If your Honor decides that the ABN was, in fact,  
5 defective, as she swore it was because they didn't give it  
6 to her, we have other reasons why it's defective. They  
7 listed the wrong test. That's neither here nor there.  
8 They both are individual to her. And you decide that the  
9 ABN is defective, it's a nullity. She doesn't have an ABN,  
10 she can fit into the existing class.

11 THE COURT: Then my question is this: What is my  
12 class now? Is my class a class of people who have never  
13 gotten an ABN or a class of people who have never gotten an  
14 ABN or, alternatively, have gotten defective ABNs?

15 MR. TUSA: Thank you very much. That's the question  
16 I was getting to because that's another question your Honor  
17 asked.

18 Once again, we were somewhat taken by surprise about  
19 this issue because defendants didn't give it to Miss Camaj  
20 when she asked for. They also didn't give it to her at the  
21 time she had it, so, of course, we never saw it. That's  
22 why our class was defined the way it was.

23 Your Honor asked could the class be changed to say  
24 people with either no ABN, like our initial class  
25 representative, Miss Cassese, or a defective ABN. That is

1 one way to deal with it. Again, this issue was somewhat  
2 thrust upon us with defendants' opposition papers.

3 We think either alternative is fine and we don't  
4 think -- there is another question pregnant in your Honor's  
5 question and, that is, did they just not give her the ABN  
6 or is it their policy not to give the copies to anyone.

7 If that's the policy, then it really is uniquely  
8 appropriate for class.

9 Now, I will tell you when she put in her declaration,  
10 said I never got a copy of this and that's the rule,  
11 defense put a surreply and their response was, oh, yeah, we  
12 gave her a copy.

13 No, they never said that. They don't dispute she  
14 never got a copy. That alone voids the ABN.

15 I'll say there's another issue that voids the ABN.  
16 They listed the wrong test and this is somewhat technical,  
17 and I don't expect -- you really need the papers for this  
18 one -- but they listed the test as one code. It was  
19 another. We read their explanation from Mr. Diffley and  
20 his surreply affidavit, and I will -- I just want to put on  
21 the record this one point.

22 If you look at Tusa exhibit E in support of  
23 intervention, the reply declaration, and compare it to Mr.  
24 Diffley's Exhibit 6, which is with his surreply, this lists  
25 tests for the two codes, and we still believe they're

1 different. I know they believe they're not different. But  
2 we believe they describe one test to her and reported  
3 reimbursement to Medicare for another.

4 I believe those are all the points I wanted to  
5 briefly touch on today. Thank you, your Honor.

6 THE COURT: Thank you. All right.

7 MR. MELODIA: Where do I start after an hour and a  
8 half? I'll try to be brief and responsive.

9 THE COURT: Let me put it this way. Okay. Your job  
10 is to persuade me, not to go through your checklist. I've  
11 been asking Mr. Tusa some fairly tough questions as we've  
12 gone along here, and Mr. Tusa has indeed been doing a  
13 superb job of responding and arguing.

14 So, deal with his responses. In short, forget about  
15 what any prepared outline you might have might consist of.  
16 I've read the papers.

17 MR. MELODIA: Yes, your Honor. Let me start at the  
18 end with the Medicare point and Miss Camaj as potential  
19 intervenor here.

20 Of course, any intervenor has to have some claim in  
21 the case, some cause of action, some interest which has  
22 been affected, whether we're looking at Rule 15, 20 or 24,  
23 (a) or (b).

24 That's very much in question here, and we've heard  
25 again many of the reasons why that remains very much in

1 question here today.

2 It is clear that Miss Camaj has not said that she did  
3 not sign the ABN. She never says in her declaration that  
4 she did not sign it, that that's not her signature, that  
5 that is not an ABN which she signed prior to the test being  
6 given and any billing.

7 And of course, that's the test. And I appreciate  
8 what Mr. Tusa thinks Medicare regulations should say, what  
9 they should be, but the reality is what they are, is that  
10 this legal analysis turns on whether or not Miss Camaj had  
11 prior knowledge in any form that Quest might send a bill  
12 for this service. And of course, Miss Camaj did. We know  
13 that, and that's not disputed.

14 What's disputed is whether she received a copy, and  
15 Mr. Tusa says that he and she were surprised that Quest  
16 came forward with an ABN and, yet, she doesn't say she  
17 didn't sign it.

18 We were surprised a year after your Honor's decision  
19 that Miss Camaj came forward as a potential named  
20 representative in this case, and we have no evidence that  
21 Miss Camaj or her physician ever called or contacted  
22 anybody at Quest.

23 We have seen her improper contact with CMS,  
24 attempting to get information that CMS would not have and  
25 CMS told her and the physician that they would not have.

1           As important, Quest has a determination from CMS  
2 prior to billing her that says please go ahead and bill  
3 her, a Medicare patient. So, Miss Camaj has no claim but  
4 this isn't an improper merits argument. This is an  
5 argument about what is required under their class  
6 definition as modified in their briefing and argument  
7 today.

8           Now, if we go back to what your Honor said is  
9 actually in the stated definition, it talks about whether  
10 somebody did or did not sign an ABN, and we have a signed  
11 ABN, so, Miss Camaj can't intervene on behalf of that  
12 class. She can't be adequate. She can't be typical. We  
13 know that.

14           THE COURT: Okay. Let me stop you there.

15           (Discussion off the record.)

16           THE COURT: I apologize. I'm trying to multi-task.

17           MR. MELODIA: Fair enough, your Honor. Just to  
18 continue and finish briefly on the Medicare issues that  
19 have been raised, even if there were, which there is not,  
20 some factual question about what happened and whether or  
21 not Miss Camaj has some claim, under their modified class  
22 definition, in order for Miss Camaj to have any claim and  
23 any standing before this Court at all, it has to be on the  
24 basis that her ABN was somehow defective, to use Mr. Tusa's  
25 word, or not valid, and that determination we know will

1 require looking at individualized facts in a way that, when  
2 the Court was looking at Miss Cassese's situation and the  
3 no payment there, you did not have those facts before you.

4 Your Honor looked previously and found that Miss  
5 Cassese, the previous named representative put forward by  
6 plaintiffs on behalf of this purported class, was not  
7 typical and not adequate because she had not made a  
8 payment.

9 Mr. Tusa seemed to think if he could find anybody who  
10 had made a payment on a Medicare bill, that automatically  
11 they would therefore step in and become a valid class  
12 representative.

13 Clearly that's not -- that does not follow logically  
14 from the Court's prior opinion, and the Court before was  
15 not presented with this validity and defective argument  
16 before, and your Honor was not presented before with the  
17 language of what is actually required by the Medicare  
18 regulations in order to determine whether or not Quest has  
19 a right to bill. It is not true that every bill is  
20 wrongful.

21 THE COURT: Now, let's move on to the proposed  
22 breach-of-contract class.

23 MR. MELODIA: Good. I understand from your Honor's  
24 questions prior to our break that -- I won't presume to  
25 know where your Honor is in your rulings or thinking.

1 THE COURT: Don't even guess.

2 MR. MELODIA: I'm not even going to guess. And I  
3 have ripped up my prior outline. So, let me go to what I  
4 understand, though, to be Quest's hardest case, our  
5 toughest position, which would be single claim breach of  
6 contract, single payer contract, and single state.

7 That's Quest's toughest case. If we can persuade you  
8 that that class is not certifiable, then clearly everything  
9 else in the post-EOB class cannot be certified because we  
10 know there are -- your Honor's already ruled in February of  
11 '09 concerning the differences in state contract law. So,  
12 if there are different contracts at issue, that goes away.

13 We've already had a discussion about scienter and  
14 RICO and a whole lot of other things.

15 If we focus and assume, let's assume, take away the  
16 issue of whether or not exhibit four, hearing exhibit four,  
17 and the Anthem contract put forward is or is not covering  
18 Mr. Grandalski. Let's assume it is. And let's assume  
19 further that the third-party beneficiary argument in our  
20 brief is wrong.

21 THE COURT: Or alternatively is --

22 MR. MELODIA: In dispute.

23 THE COURT: -- frankly a pure merits issue which does  
24 not destroy certification.

25 MR. MELODIA: We have at least three issues that

1 still make class certification of that class impossible.

2 First, in order to determine the issue, even if the  
3 contract is as clear as plaintiffs say it is on the third-  
4 party beneficiary issue, and even if on the plain language  
5 of the contract defendants' position is incorrect, that  
6 does not mean that contract gets enforced under Connecticut  
7 law, if there's a hold harmless provision in the state  
8 statute which differs or if there's other law, statutory  
9 law in Connecticut which would need to be looked at. Point  
10 number one.

11 We would need to look at what does Connecticut law  
12 say about these issues and is this contract language  
13 enforceable.

14 THE COURT: But dealing with that, quite frankly,  
15 that deals with cohesive -- having to look at individual  
16 state law deals with cohesiveness issues, deals with  
17 manageability issues, in fact, deals with whether or not a  
18 class action is preferable to other means of resolving it.

19 All right. If I'm looking at the law of one state,  
20 that doesn't present those issues. It may very well be  
21 that on the merits is a determination by the Court that  
22 there is or is not a cause of action. But that's what  
23 looking at Connecticut law implicates in terms of, you  
24 know, proceeding with a class action.

25 MR. MELODIA: Fair enough. Let's take the



1 choice-of-law issue completely off the table for these  
2 discussions. We still have at least two problems here.

3 One is, there's been a lot of discussion about the  
4 EOB and how the EOB is sacrosanct and always right and must  
5 be relied upon. That's essentially plaintiffs' position.

6 They say it's our position, and they provided some  
7 quotes in one of the hearing exhibits today during the  
8 course of this case in which we didn't say that.

9 What we said was, and what we continue to say,  
10 because our position in this six-year case has been  
11 consistent, we say that the EOB is important, Quest is  
12 dependent upon it, and it is absolutely true, as Mr.  
13 Diffley and others testified, that Quest does not go back  
14 for the 500,000 bills it sends a day and check every payer  
15 contract and have discussions with physicians and look at  
16 requisitions and do everything else that's involved in that  
17 understanding of an individual transaction in order to send  
18 a bill.

19 We do map our systems to meet payer contracts but,  
20 more importantly, we do rely on EOBs. We're dependent on  
21 them. That's true.

22 That is utterly different than saying that everything  
23 that went into an EOB is irrelevant, and everything that  
24 happened before an EOB was issued is irrelevant. And it's  
25 utterly different than saying every EOB is correct.

1           We know that's not true. We know that's not true in  
2           this case and, therefore, it follows that it's also  
3           ridiculous on this record to claim that every bill that's  
4           sent above an EOB or different than an EOB is improper. It  
5           is absolutely false.

6           How do we know that? We look at the plaintiffs and  
7           the transactions that Mr. Tusa has put before us. We look  
8           at exhibit 25 to Mr. Tusa's certification, and we look at  
9           Hoecher, we look at McKenna and we look at Haley, to take  
10          three examples where EOBs were wrong.

11          We also look at Cruthers. We look at Cruthers  
12          because she had competing EOBs from different carriers, the  
13          scenario that the Court talked about earlier.

14          Therefore, it is incorrect and a false premise to  
15          start basing a class on to say that simply because Quest  
16          billed an amount different than an EOB, that that  
17          automatically becomes improper or unlawful.

18          Why is that important? Because then all of the  
19          findings of this Court from February of 2009 become  
20          relevant again. Everything your Honor found earlier about  
21          needing to look at the requisitions, needing to look at all  
22          of the documents leading up to the EOB are very much still  
23          at issue.

24          And again, I'm not making this up as a defense lawyer  
25          to make this unduly complex. I am tracking the evidence of

1 record in this case, mainly presented by Mr. Tusa, but also  
2 from the expert, Mr. Dyckman. So, that's point number one.

3 THE COURT: Let me ask you this. Suppose in a single  
4 state with a single contract you have provisions which say  
5 that Quest shall not balance bill any beneficiary who is  
6 part of the preferred provider -- of a preferred provider  
7 network or actually this preferred provider network which  
8 is the subject of this contract.

9 MR. MELODIA: Right.

10 THE COURT: You get an EOB and you bill in excess of  
11 the EOB -- the patient responsibility shown on the EOB.  
12 Okay. And let's assume that the contractual provision is,  
13 in fact, intended to provide the consumer with the rights  
14 of the third-party beneficiary under the contract. Let's  
15 also assume arguendo that the state law also says you can't  
16 balance bill in excess of what an EOB says.

17 MR. MELODIA: And that it covers Quest and  
18 laboratories and not just HMOs and all the other things.

19 THE COURT: Right. Assuming all of that.

20 MR. MELODIA: Yes.

21 THE COURT: Why would one have to go back looking  
22 through the history to do a straight breach-of-contract  
23 claim? In short, if I were the plaintiffs in this case, I  
24 would be saying to you, you know, the EOB is wrong. It's  
25 your job to sort out the EOB with the insurance company --

1 all right -- and it's your job to do it before you bill me,  
2 and if you actually billed me and I paid and it was in  
3 excess of what the EOB said, that's a breach of the  
4 contract and I was intended to be a beneficiary of it.

5 MR. MELODIA: Right.

6 THE COURT: What's wrong with that argument?

7 MR. MELODIA: Okay. Well, several things. One,  
8 obviously you're making a lot of assumptions and we don't  
9 and never have in six years of litigation had that scenario  
10 in front of us, so we don't have -- not only do we not have  
11 numerosity, we don't have a named plaintiff for that  
12 purported class. After six years, plaintiffs' burden on  
13 the last motion, plaintiffs' burden on this motion.

14 Number two, the closest we have to that scenario is a  
15 date of service for McKenna, September 26, '05, in which  
16 what we've called in prior proceedings a chubby finger  
17 error, a data entry error, has resulted in a bill going out  
18 for an amount in excess of an EOB. It went out for \$604.02  
19 instead of \$60.40.

20 That clerical error fits all of your criteria, your  
21 Honor. That bill would be in your class and, yet, nobody  
22 can argue that there was a breach of contract that would  
23 hold up because McKenna, number one, never paid, knew that  
24 it was an error and never paid and, number two, let's talk  
25 about refunds, because in a breach-of-contract case we have

1 to have damages. We know that. And I believe the Court  
2 has previously held that in your earlier decision.

3 THE COURT: I don't think there's much doubt that  
4 there has to be an element of a breach of contract.

5 MR. MELODIA: There's no statutory damage here and  
6 it is also not true that simply sending a bill without any  
7 other action on the part of the plaintiff receiving the  
8 bill gives rise to a cause of action that would be valid  
9 under breach of contract or other theories, and nobody has  
10 pointed after six years to any law that says, you know, it  
11 is improper and a breach of contract to send the bill.

12 But let's assume payment, which we don't have in the  
13 McKenna transaction, or any other which fits your Honor's  
14 criteria, and then the question becomes was there a refund.  
15 And that issue, your Honor has already ruled upon under the  
16 FRD cite for the Agostino decision for February of '09, it  
17 would be 256 FRD at 471.

18 THE COURT: I remember that page precisely.

19 MR. MELODIA: I knew you would. And there are at  
20 least two quotes on that page which specifically go to the  
21 issue of why evidence of record in this case establishes  
22 that a refund does raise individualized issues and cannot  
23 be determined in any systemic way that relied on Dyckman,  
24 our expert, that relied on Hanlon, uncontradicted  
25 testimony, and it relied on the uncontradicted testimony of

1 Quest employees, Bowman, and I'm forgetting all the names,  
2 but there were three or maybe four, Frank Espinal, four  
3 depositions in which Quest employees said essentially the  
4 same thing.

5 THE COURT: Okay. Let me shift to another subject --  
6 all right -- and it's going to implicate you at this point,  
7 both of you.

8 In short, and let's forget about the issue of the  
9 standing issues and so on. I got -- I do have plaintiffs  
10 who in fact have debt collection claims who are still in  
11 here, and they're of two different characters. Let's take  
12 first the additional fee.

13 MR. MELODIA: Okay. Your Honor, the debt collection  
14 claim is not against Quest at all. I don't know if perhaps  
15 my colleague can address these.

16 THE COURT: But you assert that in fact it was  
17 assessed by Quest.

18 MR. CIPPARULO: Good afternoon, your Honor. Yes, it  
19 was asserted -- it was tacked on or placed onto the  
20 collection by Quest. That is undisputed. Quest does not  
21 dispute that it placed on the collection fee prior to it  
22 being transmitted to the collection agencies.

23 And there are only two collection agencies that were  
24 even involved in this \$10 fee. That would be Quantum and  
25 CBC, and it's undisputed that Quantum and CBC did collect

1       those fees if they were successful, but it's also  
2       undisputed that those fees were given to Quantum, given to  
3       CBC, with the fee added on by QDI, and QDI will not dispute  
4       that.

5               What is also undisputed is that the plaintiff does  
6       not have a suitable class representative because Mr.  
7       Grandalski testified, who is the only representative with  
8       respect to those Quantum and CBC, Mr. Grandalski testified  
9       in his deposition that he did not believe he had been  
10      misled by Quantum, so, there's now a fact specific defense  
11      that will not apply to --

12             THE COURT: Well, the charging of fees, does that  
13      depend upon being deceived?

14             MR. CIPPARULO: Well, one of the elements of the  
15      plaintiff is charging under the FDCPA is that it was a  
16      deceptive practice. Also, this has to be made very clear,  
17      and I apologize if it's not made clear in my papers, the  
18      fee has to be added on by a collector and that fee is not  
19      permitted between the underlying agreement between the  
20      creditor and the plaintiff or the consumer.

21             That's not the case here. This is not a case where  
22      the collector took a bill and said I'm going to put \$10 on  
23      for my efforts to collect this fee. This fee was put on  
24      long before it ever saw the collector's desk.

25             THE COURT: Question, is that an issue which goes to

1 the merits as opposed to whether or not a class could be  
2 certified? In short, if indeed the routine practice of  
3 Quest was to add a \$10 fee before it was ever sent to you  
4 and if that constitutes a defense under the statute, is  
5 that something which defeats class certification?

6 MR. CIPPARULO: Well, I think with respect -- that's  
7 one of the reasons why I brought up Grandalski, because  
8 there is a fact specific defense to Grandalski, but I  
9 think, understanding your Honor's question, I do think  
10 there has to be at least not an inquiry into the  
11 substantive of the claim but -- into the substance of the  
12 claim, but has to be some sort of inquiry into the  
13 mechanism of the claim, and I think the mechanism that the  
14 plaintiff relies on in his second amended complaint -- this  
15 is the one that he has filed with the Camaj motion --  
16 suggests that -- not suggests -- states that fee was added  
17 on by the collector, and that's simply not the case.

18 THE COURT: What I'm suggesting to you is this: What  
19 changes this from being a situation in which I certify a  
20 class and you win a summary judgment motion? I haven't had  
21 summary judgment motions.

22 MR. MELODIA: Just one, your Honor, and you granted  
23 it.

24 THE COURT: Just the one. And what I'm suggesting to  
25 you, you know, I am permitted and, indeed, encouraged to



1 look at the merits of the claim but only for a particular  
2 reason, and that is to explore how the claim could in fact  
3 be established at trial and, therefore, whether it's  
4 susceptible in practical terms to being treated as a class.  
5 And that's the purpose for looking at the merits of claims,  
6 not to decide on the merits, whether somebody wins or  
7 doesn't win on the merits.

8 MR. CIPPARULO: I understand, your Honor. Thank  
9 you.

10 THE COURT: In short, I could certify a class which  
11 was the absolutely dead loser of all time and it could  
12 still be a properly certified class. Correct?

13 MR. CIPPARULO: It could be properly certified but  
14 ultimately be dismissed. I understand your Honor's  
15 question.

16 I think that you would have to also get to the  
17 question as to why some of the fees were added on and why  
18 some of the fees weren't added on, because it was not a  
19 unified practice.

20 MR. MELODIA: And that, your Honor, if I could --

21 MR. CIPPARULO: Please.

22 MR. MELODIA: -- add on to what's been said here,  
23 that was the assumption in your Honor's point, that there  
24 has been established in some way of record by the  
25 plaintiffs who have a burden on this motion six years into

1 the case to -- that there is a unified practice and that  
2 there is numerosity.

3 There is no showing on this record, there's  
4 absolutely no numerosity of record in this case. That's  
5 number one right now on this record something that  
6 prohibits certification of even this \$10 add-on charge  
7 claim.

8 The other thing I'd point out is that there is no  
9 class that's been put forward by plaintiffs as simply about  
10 this \$10 charge. That's an issue that comes out of the  
11 record and out of the briefing as something that is more  
12 discrete, and I understand why the Court raises it, but it  
13 is not something that plaintiffs have put forward as a  
14 simple class.

15 THE COURT: The Court's allowed to narrow classes  
16 and --

17 MR. MELODIA: The Court obviously can conform to the  
18 record evidence, as plaintiffs could have conformed their  
19 complaint over the past six years to the record evidence.

20 THE COURT: Okay. One second question, which is, as  
21 to the claims which essentially say deceptive wording in  
22 the dunning letter and, again, as directed at those  
23 collection agencies which, in fact, have a plaintiff who  
24 received a letter from those agencies, what prevents them  
25 from being certified as a class?

1           MR. CIPPARULO:     That's -- I'll give you two  
2     arguments. I'm going to delve into the merits just briefly  
3     because it has to be stated, but regarding more the class  
4     argument, you have to look into subjective intent. Your  
5     Honor dealt with that extensively in the first opinion.

6           You have to look at the intent of each collector as  
7     to whether it was authorized to send this letter, whether  
8     it was an unintended threat.

9           It's not a simple form letter case, your Honor, which  
10    you're saying this language as a matter of fact is a  
11    violation of the FDCPA. Form letters cases are  
12    particularly susceptible to class certification. This is  
13    not a form letter case.

14          THE COURT:   Well, how many -- I mean, to put it  
15    truthfully, and this may not be -- obviously, it's not in  
16    the record. I've never heard of a collection agency which  
17    does not have form letters, form letter A, B, C, D or E,  
18    but they tend to have progressive form letters as it were.  
19    Isn't that correct?

20          MR. CIPPARULO:   Let me be clearer. You're  
21    absolutely correct. But the language of the form letter  
22    can be particularly susceptible to FDCPA claim.

23          For example, if you do not have the necessary  
24    warnings that are required by the FDCPA, you can contest  
25    that. If that language is missing in your initial letter,

1       that's an easy class to certify. Anyone who received that  
2       letter can be -- can be a member of the class.

3               THE COURT: Okay. As I understand it, the core of  
4       plaintiffs' claims are, apart from the \$10 fee, are  
5       deceptive letters in that either they're threatening  
6       further conduct implicitly or explicitly, when no further  
7       conduct is intended or, alternatively, making such threats  
8       where they were not authorized by Quest to, in fact, engage  
9       in such conduct if there was no payment.

10              Now, I understand full well that, you know, that the  
11       statute stems from the good all days when the letter would  
12       say if you don't pay this, the funds in dispute by X date,  
13       we will initiate suit against you. All right.

14              The letters don't say that anymore, and when the  
15       letters did say that, it would be very simple to see  
16       whether or not there was an internal policy with regard to  
17       initiating suit, for example, a dollar cutoff, which is not  
18       uncommon, or alternatively, a procedure for specifically  
19       requesting preauthorization from the creditor.

20              Now, as I understand it, the letters in question here  
21       are less definitive. They tend to suggest further action  
22       without specifying what the action is. Correct?

23              MR. CIPPARULO: Further collection attempts.

24              THE COURT: Okay. And one question, of course, is,  
25       indeed, whether or not implicitly that is threatening legal

1       action, for example, and counsel for plaintiff have been  
2       very generous in citing case law to me which essentially  
3       says that, what we all know, which is that we are to view  
4       all the language in these letters in light of the most  
5       unsophisticated recipient and whether or not that  
6       unsophisticated recipient would indeed interpret it as a  
7       threat of litigation, for example. Correct?

8               MR. CIPPARULO:     Least sophisticated consumer  
9       standard.

10              THE COURT:   Okay. So, with regard to this language,  
11       one common issue would be whether or not, viewing it  
12       through the light of the most unsophisticated recipient, it  
13       would be interpreted as threatening litigation. Correct?

14              MR. CIPPARULO:   I'm not sure that that's been pled.  
15       I think what's been pled is that -- what he's claiming is  
16       that we were putting a threat in our letter that we weren't  
17       intending to pursue.

18              THE COURT:   But frankly, I assume that -- I assume,  
19       quite frankly, that the thrust of that was either going to  
20       be initiated litigation or, alternatively, initiating  
21       communications with a credit bureau, one or the other. Is  
22       that correct?

23              MR. TUSA:   Your Honor is correct, yes.

24              MR. CIPPARULO:   The problem I have with plaintiffs'  
25       argument is that he attaches letters from 2004, he attaches

1 letters from 1998, he attaches letters from 2001, but in  
2 the very papers that he relies on, if you look at his  
3 exhibit 15, he concedes that the first time it was even  
4 discussed in QDI as to whether they should even address  
5 these form letters or these letters with their debt  
6 collection agency isn't until 2005, so, the letters  
7 saying -- the statute says you cannot send a letter in  
8 which you have no intent to pursue or are not authorized to  
9 pursue conduct.

10 There's no evidence at all in this case that any of  
11 the debt collectors took any action that they were not  
12 allowed to pursue.

13 The first time it's even discussed, according to Miss  
14 Espinal's testimony, is in June 2005, and that's in the  
15 plaintiffs' moving papers, exhibit 15, specifically page 52  
16 of Miss Espinal's testimony. So, how can you say that they  
17 were not -- that's why I tried to make the point before,  
18 you're going to have to look into the subjective intent of  
19 each -- of the writer of the letter because it wasn't even  
20 discussed with QDI in its debt collection until sometime in  
21 2005, and the letters that he relies on in exhibits 16, 17,  
22 18, 19 and 20 for various reasons are all dated pre-2005.

23 MR. MELODIA: If your Honor is done on that, I want  
24 to go back to the \$10 issue for one moment.

25 THE COURT: All right.

1           MR. MELODIA: Because I think while your Honor may  
2 view this as too close to a merits issue or too unique or  
3 peculiar to Mr. Grandalski, the only person to claim this  
4 \$10 fee having been added, we think it goes more to what  
5 Hydrogen Peroxide counsels, that is, how do I go about  
6 making a decision, what are the types of issues that could  
7 arise when I'm looking at the merits of a claim.

8           And, in particular, there are, I guess, three things  
9 I want to say. First, there's no allegation or at least no  
10 evidence at all before the Court that this \$10 fee was in  
11 any way a national practice or practice for any extended  
12 period of time.

13           I already made the point about no numerosity of  
14 record. But in addition, I want to make the point that at  
15 most, what we're dealing with is a business unit, Las  
16 Vegas, for a very limited period of time where this charge  
17 is in question. That's point number one.

18           Number two is, we still have the question of refunds  
19 in this context, whether or not refunds were given post  
20 collection. There are circumstances where courtesy and  
21 other refunds are given, and we have had examples of that  
22 in the named plaintiffs, not Mr. Grandalski, but in other  
23 named plaintiffs.

24           THE COURT: Would that save -- would a refund save  
25 anybody from a Fair Debt Collection Practices Act claim

1       frankly? I doubt it very much.

2               MR. MELODIA:     Probably not. It's not a breach of  
3       contract.

4               And I think the third point may go more to a breach-  
5       of-contract scenario, but I'm not sure about that. I just  
6       wanted to raise factually that we're in a setting,  
7       according to the record, with regard to Mr. Grandalski,  
8       where he owes -- and there's no real dispute that he owes  
9       \$40 that he never paid to Quest, because the bills that  
10      were being sent were correct bills, consistent with the  
11      EOB, by the way, and he never paid them. We think because  
12      the address was wrong. Again, we go back to this garbage  
13      in, garbage out. If you have garbage in on the address at  
14      the front end, you end up with an EOB going to the wrong  
15      person, a bill going to the wrong person at the wrong  
16      address.

17              THE COURT:   Thank you, folks. Look, I believe we've  
18      covered a lot of territory and you've been helpful.

19              Now, you get one last crack. Fifteen pages from each  
20      of you, no surreplies, no surreplies, no anything. All  
21      right. 15 pages simultaneously submitted, dealing with  
22      what you think are the most significant things I should now  
23      be dealing with. You've heard my concerns. Persuade me.

24              MR. TUSA:    Your Honor, single spaced, double spaced?

25              THE COURT:   According to our standard motion practice



1 rules. Okay. And the reason why I've got it at 15 is, I  
2 know you're all superb lawyers and it takes superb lawyers  
3 to write brief briefs.

4 I've already had your extensive ones. Now I need the  
5 short ones. All right?

6 MR. CIPPARULO: Your Honor, do I get fifteen pages  
7 for each debt collector defendant?

8 THE COURT: No, you don't.

9 MR. CIPPARULO: Okay, your Honor.

10 THE COURT: Thank you, folks. It's been a pleasure.

11 MR. TUSA: When will those briefs be due?

12 THE COURT: Talk about it between yourselves. All  
13 right. I'm sure this much you can decide upon. Okay?

14 MR. MELODIA: Yes, sir.

15 THE COURT: Thank you.

16 (Whereupon the proceedings are adjourned.)  
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